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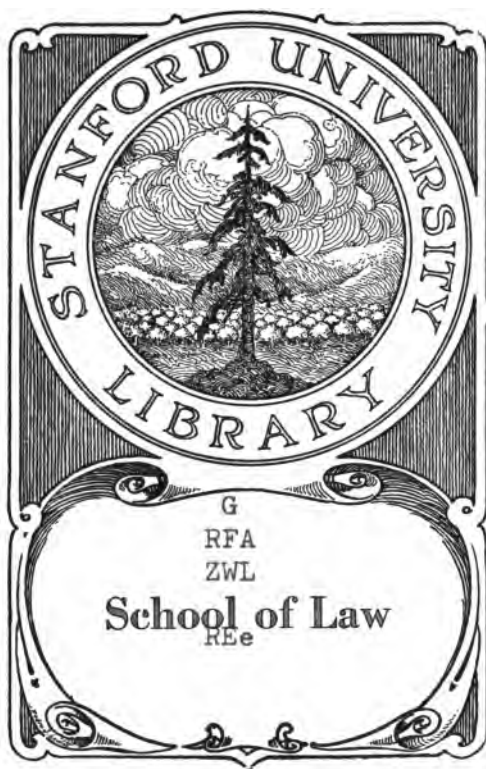
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DIGEST

OF THE

DECISIONS OF THE SUPREME COURT

OF

THE UNITED STATES,

FROM

FEBRUARY TERM, 1821, TO JANUARY TERM, 1829:

AND ALSO OF

THE CASES

IN THE

CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES;

FROM THE COMMENCEMENT OF THE REPORTS:

BEING A CONTINUATION OF

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SOUTHERN DISTRICT OF NEW-YORK, ss.

BE it remembered, That on the fourteenth day of November, in the fifty-fourth year of the Independence of the United States, A. D. 1829, Robert Donaldson, of the said District, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit :

“A Digest of the Decisions of the Supreme Court of the United States, from February Term, 1821, to January Term, 1829: and also of the Cases in the Circuit and District Courts of the United States; from the commencement of the Reports: being a continuation of Wheaton's Digest. By two Gentlemen of the New-York Bar.”

In conformity to the act of Congress of the United States, entitled “An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;” and also to an act, entitled “An act supplementary to an act, entitled An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.”

FREDERICK J. BETTS,

Clerk of the Southern District of New-York.

LIST OF WORKS DIGESTED IN THIS VOLUME.

Wheaton, Vols. 6 to 12 inclusive.

Peters, Vols. 1 and 2.

Gallison, 2 vols.

Mason, 4 vols.

Paine, 1 vol.

Peters' C. C. R. 1 vol.

Washington's C. C. R. 3 vols.

Peters' Adm. Decis. 2 vols.

Bee, 1 vol.

Burr's Trial, 2 vols.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES.

[Continued from page vi. of Wheaton's Digest.]

The Hon. SMITH THOMPSON,* Associate Justice, December 9, 1823.

The Hon. ROBERT TRIMBLE,† Associate Justice, May 9, 1826.

The Hon. JOHN M'LEAN,‡ Associate Justice, March 7, 1829.

* Appointed in the place of Mr. Justice Livingston, deceased,

† Appointed in the place of Mr. Justice Todd, deceased.

‡ Appointed in the place of Mr. Justice Trimble, deceased.

RULES AND ORDERS
OF THE
SUPREME COURT OF THE UNITED STATES.

[Continued from page xiv. of *Wheaton's Digest*.]

XXX.

February Term, 1821.

After the present term, no cause standing for argument will be heard by the Court, until the parties shall have furnished the Court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents, on which the parties rely, and the points of law and fact intended to be presented at the argument.

XXXI.

February Term, 1821.

Whenever pending a writ of error, or appeal in this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined, as in other cases : and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record ; and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed ; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing, have the same reversed, if it be erroneous. Provided, however, that a copy of every such order shall be printed in some newspaper at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

XXXII.

February Term, 1821.

In all cases where a writ of error, or an appeal, shall be brought to this Court, from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable ; it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the Clerk of this Court, within the first six days of the term ; on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon the cause shall stand for trial in like manner, as if the record had been duly filed within the first six days of the term ; or at his option, he may have the cause docketed and dismissed upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed.

XXXIII.

February Term, 1823.

No cause will hereafter be heard, until a complete record shall be filed, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this Court.

XXXIV.

February Term, 1824.

No certiorari for diminution of the record shall be hereafter awarded, in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit, And all motions for such certiorari shall be made at the first term of the entry of the cause ; otherwise the same shall not be granted, unless upon special cause shown to the Court, accounting satisfactorily for the delay.

XXXV.

February Term, 1824.

In all cases of Equity and Admiralty Jurisdiction heard in this Court, no objection shall hereafter be allowed to the admissibility of any deposition, deed, grant, or other exhibit found in the record, as evidence, unless objection

was taken thereto in the Court below, and entered of record ; but the same shall otherwise be deemed to have been admitted by consent.

XXXVI.

February Term, 1824.

On Saturday of each week during the sitting of the Court, motions, in cases not required by the rules of Court to be put upon the docket, shall be entitled to preference, if such motions shall be made before the Court shall have entered upon the hearing of a cause upon the docket.

XXXVII.

February Term, 1825.

Ordered, That after the present term, no original record shall be taken from the Supreme Court Room, or from the office of the Clerk of this Court.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.

UNDER the authority given to this Court, by the Act of May 8th, 1792, c. 137, s. 2, the following Rules were ordered by the Court, at February Term, 1822, to be the Rules of Practice for the Courts of Equity of the United States :

RULE I.

RULES shall be held monthly in the Clerk's office on the first Monday in every month, for the purpose of entering all proceedings and orders which may be entered at the rules, and which are not taken or made in open Court. The rules shall be held under the direction of the Clerk ; but either of the Judges of the Court may make or allow any special orders in any cause, not inconsistent with the regulations herein prescribed, which shall be entered in the rule book, and take effect accordingly.

RULE II.

All process shall be made returnable to the next succeeding term, or to any intermediate rule day, at the election of the party praying the same, and the return of the said process "executed" shall be effectual whereon to ground any subsequent proceedings. If the party be not found, a copy served by the person leaving the same shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling-house or usual place of abode, and the truth of the case shall be returned ; and where such process shall not be executed, the Clerk is directed to issue other similar process, if the same be required by the party at whose instance the original process was sued out ; and if upon such second process the party be not found, a copy shall be again left in like manner as is hereinbefore directed, and upon a second return that the party is not found, and that a copy has been left as herein directed, the same proceedings may be had as on process returned executed.

RULE III.

Where any person, either plaintiff or defendant, in any suit, shall be dead, it shall be lawful for the Clerk, during the recess of the Court, upon application, to issue process to bring into Court the representative of such deceased person.

RULE IV.

The plaintiff shall file his bill before or at the time of taking out the subpoena.

RULE V.

The plaintiff may amend his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.

RULE VI.

The day of appearance shall be the rule day after the process is returned executed, or after the second return of a copy left *if the process shall not be executed*, when the process is returnable to the rules, or the rule day next succeeding the term, where the process shall be returnable to a term of the Court; and if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown at the term next succeeding that to which the process shall be returned executed.

RULE VII.

If the defendant cannot be found, it shall be sufficient service of any decree nisi to leave a copy thereof with his wife, or any free white person who is a member of his or her family; and if no such person be found, then it shall be sufficient service to publish the same in such paper of the District as may be designated by the Court for such time as the Court shall direct.

RULE VIII.

All process shall be executed by a sworn officer, or affidavit must be made of the service thereof, when executed by any other person.

RULE IX.

Every defendant may swear to his answer before any justice or judge of the United States, or a commissioner or master, or other person appointed by the

RULES OF PRACTICE.

xii:

Court, or judge of any Court of a State or Territory, or justice of the peace, or notary public of any State or Territory.

RULE X.

If the defendant does not file his answer within three months after the subpoena be returned executed, or after a second return of a copy left having been made at least three months, the plaintiffs may either proceed on his bill as confessed, or have a general commission to take depositions, or he may move the Court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the two last cases as if the answer had been filed and the cause was at issue. Provided that the Court may, on cause shown, allow the answer to be filed, and grant a further day for such hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody until he shall file his answer, or be discharged by order of the Court or one of the judges thereof.

RULE XI.

No special replication to an answer shall be filed but by leave of the Court, or one of the judges thereof, for cause shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without costs at the discretion of the Court.

RULE XII.

When a cross bill shall be exhibited, the defendant or defendants to the first bill shall answer thereto, before the defendant or defendants to the cross bill shall be compelled to answer such cross bill.

RULE XIII.

The complainant shall put in the general replication, or file exceptions within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply with the clerk of the Court, which being expired, and no replication or exceptions filed, the suit may be dismissed with costs; but the Court may, for cause, order the same to be retained on payment of costs.

RULE XIV.

If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave a rule with the clerk to make a better answer within two calendar months; and if within that time the defendant shall put in a sufficient answer, the same shall be received without costs; but if any defendant insists on the sufficiency of his answer, or neglects or refuses to put in a sufficient answer, or shall put in another insufficient answer, the plaintiff may set down

his exceptions to be argued at the next term; and after the expiration of that rule, or any second insufficient answer put in, no farther or other answer shall be received but on payment of costs.

RULE XV.

If upon argument the plaintiff's exceptions shall be overruled, or the defendant's answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the Court.

RULE XVI.

Upon a second answer being adjudged insufficient, costs shall be doubled by the Court, and the defendant may be examined upon interrogatories, and committed until he or she answer them; or the plaintiff may move the Court to take so much of his bill as is not answered for confessed, and may file his replication, obtain commissions, and proceed to hearing in the usual manner.

RULE XVII.

Rules to plead, answer, reply, rejoin, or other proceedings not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office, and shall be entered in a rule book for the information of all parties, attorneys, or solicitors concerned therein, and shall be considered as sufficient notice thereof.

RULE XVIII.

The defendant may at any time before the bill is taken for confessed, or afterwards with the leave of the Court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the residue; but in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded.

RULE XIX.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

RULE XX.

If a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was co-

vered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly.

RULE XXI.

If the plaintiff shall not reply to, or set for hearing any plea or demurrer, before the second term of the Court after filing the same, the bill may be dismissed with costs.

RULE XXII.

Upon a plea or demurrer being argued and overruled, costs shall be paid as where an answer is adjudged insufficient ; but if adjudged good, the defendant shall have his costs.

RULE XXIII.

The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill.

RULE XXIV.

After any bill filed, and before the defendant hath answered, upon oath made that any of the plaintiff's witnesses are aged, infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk may issue a commission for taking the examination of such witness or witnesses *de bene esse*, the party praying such commission giving reasonable notice to the adverse party of the time and place of taking such deposition.

RULE XXV.

Testimony may be taken according to the acts of Congress, or under a commission. Whenever a general commission shall be issued for taking depositions upon answer and replication, six months from the time of the replication shall be allowed the parties for taking their depositions ; and either party at the expiration of the said six months may set the cause for hearing, and no deposition taken after that time shall be read as evidence on the hearing, unless the same was taken by consent of parties, by special order of the Court, or out of the District.

RULE XXVI.

Commissions to take depositions may be executed by any person qualified to take testimony according to the laws of the State, or by any person or persons, not exceeding three, appointed or named in the commission by order of the Court, or by any judge thereof in vacation. All testimony taken under a commission shall be

RULES OF PRACTICE.

taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right.

RULE XXVII.

Orders for the admission of a guardian *ad litem*, to defend a suit, may be made either by the Court or one of the judges thereof.

RULE XXVIII.

Witnesses who live within the District may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioners, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in Court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the Court, which being certified to the clerk's office by the commissioners, master, or examiner, an attachment may issue thereupon by order of the Court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open Court.

RULE XXIX.

When a matter is referred to a master to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or solicitor of such party as may not reside within the District, and if either party shall fail to attend at the time and place the master may adjourn the examination of the matter to some future day, and give notice thereof to the parties, in which notice it shall be expressed that if the party fail again to appear, the master will proceed *ex parte*; and if after receiving such notice the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the Court, that such proceedings may be had thereon as to the Court shall seem equitable and right.

RULE XXX.

The Courts in their sittings may regulate all proceedings in the office, and may set aside any dismissals, and reinstate the suits on such terms as may appear equitable.

RULE XXXI.

Every petition for a re-hearing shall contain the special matter or cause on which such re-hearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No re-hearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, it may be admitted at any time before the end of the next term of the Court.

RULE XXXII.

The Circuit Courts may make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion.

RULE XXXIII.

In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England.

ORDERED by this Court, that the foregoing rules be the rules of practice for the Courts of Equity of the United States, from and after the first day of July next, and the clerk of the Court is directed to have the same printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several Courts of the United States, and to each of the Judges thereof.

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souri, and back again to the port of departure, as a cause of Admiralty and maritime jurisdiction. *The Thomas Jefferson*, 10 *Wheat*. 428.

9. The Admiralty has no jurisdiction over contracts for the hire of seamen, except in cases where the service is *substantially* performed upon the sea, or upon waters within the ebb and flow of the tide. *Id.*

10. But the jurisdiction exists, although the commencement or termination of the voyage is at some place beyond the reach of the tide. It is sufficient if the service is essentially a *maritime service*. *Id.*

11. *Quære*, Whether, under the power to regulate commerce among the several States, Congress may not extend the remedy, by the summary process of the Admiralty, to the case of voyages on the western waters? *Id.*

12. However this may be, the act of 1790, c. 29, for the government and regulation of seamen, in the merchant service, confines the remedy in the District Courts to such cases as ordinarily belong to the Admiralty jurisdiction. *Id.*

13. The Courts of the United States, proceeding as Courts of Admiralty and maritime jurisdiction, have jurisdiction in cases of maritime torts, *in personam*, as well as *in rem*. *Munro v. Alneida*, 10 *Wheat*. 473.

14. *Quære*, Whether a suit *in personam* in the Admiralty may be maintained against the owner of a ship by material men furnishing supplies for the ship in her home port, where the local law gives no specific lien upon the ship, which can be enforced by a proceeding *in rem*? *Ramsay v. Allegre*, 12 *Wheat*. 611.

15. However this may be in general, such suit cannot be maintained where the owner has given a negotiable promissory note for the debt, which is not tendered to be given up, or actually surrendered, at the hearing. *Id.*

16. The Admiralty has jurisdiction *in personam* as well as *in rem*, for pilotage earned in piloting ships to, from, and on the sea. *The Anne*, 1 *Mason*, 508.

17. The Admiralty has jurisdiction of personal torts and wrongs committed on a passenger, on the high seas, by the master of the ship. It is immaterial whether such torts be by direct force, as trespasses, or consequential injuries. *Chamberlain v. Chandler*, 3 *Mason*, 242.

18. A Court of Admiralty has jurisdiction over policies as maritime contracts, but not over contracts leading to policies. It cannot reform a policy by the antecedent contract: this part belongs to a Court of Equity. *Andrews v. The Essex Ins. Co.* 3 *Mason*, 6.

19. No suit for services performed by the master as a factor, or in any other character except that of master, is cognizable in the Admiralty. *Willard v. Dorr*, 3 *Mason*, 161.

20. A father may maintain a suit in the Admiralty for a tortious abduction or seduction of his minor son on a voyage on the high seas, in the nature of an action *per quod servitium amisit*, for it is a continuing tort. *Plummer v. Webb*, 4 *Mason*, 380.

21. A contract of a special nature is not cognizable in the Admiralty merely because the consideration of the contract is maritime service. The whole contract must, in its essence, be maritime, or for compensation for maritime services. *Id.*

22. A father is entitled to the services of his minor children. And he may sue in the Admiralty for wages earned by such children by maritime service. *Id.*

23. By the general maritime law, every contract of the master for repairs and supplies imports an hypothecation. *The Jerusalem*, 2 *Gallis*. 349.

24. A tradesman has a lien on a foreign ship, lying in a port of the United States, for repairs made by him on board, and such lien will be preferred in point of right, to a bottomry interest which is prior in point of time, if it appear that the repairs were indispensable. *Id.* 345.

25. *Quære*, If there be a lien for repairs and supplies in the case of a domestic ship? *Id.*

26. A wharfinger has a lien on a foreign ship for wharfage by the law of the Admiralty. *Ex parte, Lewis*, 2 *Gallis*. 483.

27. But if the wharfinger have made an express pledge to any court unless there owner, the Court will not give the wharfinger a priority of interest, which previously attached on the ship. *Id.* agrees to navigate her.

28. *Quare*, If such personal contract be a waiver of the lien into possession.

29. A vessel was libelled in the District Court for materials such agreement claimants stated in their claim, that they had attached the vessel for materials furnished, in a State Court, under the acts of the State of 1798 and 1817, seizure before the libel was filed, and prayed the advice and protection of the Court as regard to their priority, under the attachment, and if the vessel should be decreed to be sold, that they might be first paid. Held, that this was not a submission by the claimants to the jurisdiction of the Court, but that they were entitled to their election to proceed in the other Court. *The ship Robert Fulton*, 1 Paine, 620.

30. The Sheriff having attached the vessel under the process of the State Court, it was held that the Marshal could have no authority to take it out of his possession, but should have so returned, to prevent a conflict of jurisdiction. *Id.*

31. The Admiralty Courts, in many cases, possess cumulative powers, beyond those of the common law. The right to proceed *in rem*, does not exclude the remedy *in personam*, though it is frequently taken in preference for the greater security. In common law Courts, as in the Admiralty, a party may pursue several remedies, although he can have but one satisfaction. On the instance side of the Admiralty, the proceedings are, originally, and most commonly, by arrest of the person. *Brevoor et al. v. The Fair American*, 1 Adm. Decis. 87.

32. The Admiralty has power to authorize the majority of the owners of a vessel to fit her out and expedite her on a voyage; but security should be given to the recusant owners for their share of the vessel, that as they gain no profit, they may incur no loss. *Willings et al. v. Blight*, 2 Adm. Decis. 288.

33. The Admiralty has cognizance of matters on land, if they are incidents to those at sea. *Moxon v. The Fanny*, 2 Adm. Decis. 309.

34. If the master borrow money for repairing damages to the vessel done on the high sea, the Admiralty has jurisdiction. *Sloop Rainbow*, Bee, 116.

35. The Admiralty will not entertain jurisdiction of a contract made on land for repairs, the owners being represented on the spot by a consignee who has funds. *Pritchard et al. v. The Lady Horatia*, Bee, 167.

36. Attachments may issue out of the Admiralty Courts of the United States against the goods or debts of an absent person, so as to make him a party to the suit. *Bouysson et al. v. Miller*, Bee, 186.

37. An agreement by the captain of a vessel to pay wages is sueable in the Admiralty; but another stipulation in the same contract to pay a sum of money, if the voyage should be altered or discontinued, must be enforced at common law. *L'Arina v. Manwaring*, Bee, 199.

38. The Admiralty Courts of the United States, unless under particular circumstances, will decline interfering between foreigners respecting seamen's wages, but will refer them to the tribunals of their own country. *Thompson et al. v. The Nanny*, Bee, 217.

39. It seems that every contest or dispute between the owners and mariners, and the owners and builders or equippers of a ship for navigation on the sea, is of a maritime nature, and cognizable in the Admiralty. *Stevens v. The Sandwich*, 1 Peters, Adm. Decis. 233, in note.

40. A shipwright may sue in the Admiralty for the price of building or repairing a ship intended for navigation on the high seas. *Id.*

41. Accounts of moneys and traffic between the captain and mate are not within the jurisdiction of the Admiralty, except as they are connected with a claim for wages. *Atkins v. Burrowes*, 1 Peters, Adm. Decis. 244.

42. Supplies to a foreign vessel in a neutral port will constitute a lien upon the vessel, and are recoverable in a Court of Admiralty. *The brig Eagle*, Bee, 78.

43. Admiralty has jurisdiction of a libel by owners against their captain, for satisfaction of the damages which they have sustained in consequence of a wrongful capture made by him. *Dean v. Angus*, Bee, 369.

ADMIRALTY.

44. A ship carpenter has no lien for repairs, after the vessel is out of his possession, if the contract was made on land, and the owners resident in the place. *Shrewsbury v. Two Friends*, *Bee*, 433.

45. A shipwright cannot sue in the Admiralty for his contract for wages for building a ship or vessel designed for navigation on the high seas. *The brig Hannah*, *Bee*, 419.

46. The Court has jurisdiction in revenue causes, although the property seized may never have come into the possession of its officers. *The Bolina and cargo*. 1 *Gallis*. 75.

ADMIRALTY II.

Revenue Seizures.

47. Where the *res gesta*, in a revenue cause, are incapable of explanation consistently with the innocence of the party, condemnation follows, although there be no positive testimony of the offence having been committed. *The Robert Edwards*, 6 *Wheat*. 187.

48. Although a mere intention to evade the payment of duties be not, *per se*, a cause of forfeiture, yet when a question arises, whether an act has been committed which draws after it that consequence, such intention will justify the Court in not putting on the conduct of the party, in respect to the act in question, an interpretation as favourable as under other circumstances it would be disposed to do. *Id.*

49. Where the *onus probandi* is thrown on the claimant, in an Instance or Revenue cause, by a *prima facie* case, made out on the part of the prosecutor, and the claimant fails to explain the difficulties of the case, by the production of papers and other evidence, which must be in his possession, or under his control, condemnation follows from the defects of testimony on the part of the claimant. *The Luminary*, 8 *Wheat*, 411.

50. A decree of acquittal, on a proceeding *in rem*, without a certificate of probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other Court, that there was no justifiable cause of seizure. *The Apollon*, 9 *Wheat*, 362. 367.

51. A municipal seizure cannot be justified or excused, upon the ground of probable cause, unless under the special provisions of some statute. *Id.* 372.

52. In order to constitute a valid seizure, so as to entitle the party to the proceeds of a forfeiture, there must be an open, visible possession claimed, and authority exercised under the seizure. *The Josefa Segunda*, 10 *Wheat*. 325.

53. A seizure once voluntarily abandoned, loses its validity. *Id.* 326.

54. A seizure, not followed by an actual prosecution, or by a claim, in the District Court, before a hearing on the merits, insisting on the benefit of the seizure, becomes a nullity. *Id.* 327.

55. In an Admiralty seizure, the court cannot award a proportion of the proceeds of the property condemned to *informers*, unless the case be within some statute provision. But it will allow compensation for expenses incurred in securing and preserving the property. *Ex Parte Cahoon and Slocum*, 2 *Mason*, 85. *Robinson v. Hook*, 4 *Mason*, 139.

56. If a foreign claimant of a vessel, seized for being engaged in the slave trade, sets up a title derived from *American* owners, he must give affirmative evidence, that the case has no admixture of *American* property. *United States v. La Jeune Eugenie*, 2 *Mason*, 409.

57. Whenever property is brought into a Court of Admiralty for adjudication, for a seizure for a forfeiture, or other cause cognizable there, the property is, in contemplation of law, in the custody of the Court, and cannot be withdrawn from its possession but by some person who shall establish a title to receive it. *Id.*

58. A right of seizure may exist on the high seas, independent of any right of search. *Id.*

59. If a seizure be abandoned, no jurisdiction attaches to any court unless there be a new seizure. But to constitute such abandonment, there must be an unequivocal act of dereliction. If after a seizure of a ship, the master agrees to navigate her into port under the direction of the seizer, and then to give her again into possession of the seizer, this is no abandonment, although in consequence of such agreement the seizer's crew are withdrawn from the ship. *The Abby*, 1 *Mason*, 361.

60. After a final decree of condemnation unappealed from, in a case of seizure by a collector for a breach of the revenue laws, the Secretary of the Treasury has no authority to remit the collector's share of the forfeiture. It is a vested and absolute right. *The Brig Hollen*, 1 *Mason*, 431.

61. The officers of the Court who have the custody of property seized, pending the suit, are responsible for any loss or injury sustained by want of due diligence. *Burke v. Trevitt*, 1 *Mason*, 96.

62. If an officer of the revenue seize goods without probable cause, he is responsible for all losses and injuries however occasioned. If with probable cause, he is responsible only for losses and injuries occasioned by ordinary neglect. *Id.*

63. A forfeiture is not purged by a purchase made under a full knowledge of the facts inducing such forfeiture; or of such facts, as were sufficient to put the party on inquiry. *The Ploughboy*, 1 *Gallis*. 41.

64. Where the claimants set up a special defence against a forfeiture, the *onus probandi* lies on them; and if such defence be not satisfactorily made out, condemnation will go. *The Short Staple*, 1 *Gallis*. 104.

65. In an information on the 3d sect. of the act 1809, ch. 72, the time of receiving the act at the port, where the offence was alleged to have been committed, and also of the notice to unload, were material and traverseable. *The Bolina and Cargo*, 1 *Gallis*. 75.

66. In such an information, it was also necessary to state specially the notice given, and to whom. *Id.*

67. Doubt of law is a proper case for a certificate of probable cause of seizure. In what case certificate allowed. *The Friendship and Cargo*, 1 *Gallis*. 111.

68. *Quere*, Whether a detention before the seizure, made to support the filing of the information will be protected by such certificate? *Id.*

69. A *bona fide* purchaser, without notice, is protected against an antecedent forfeiture to the *United States*. *The Mars*, 1 *Gallis*. 192.

70. At common law, any individual might seize for the king, and upon this ground it has been held, that public or private armed ships may seize for a violation of statute. But in such case, it is at the peril of the party making the seizure. *The Rover*, 2 *Gallis*. 241.

71. To justify a seizure, there must be probable cause of seizure; and if an officer of the customs seize without probable cause, no indictment lies for resisting him in the seizure; for he is not in the execution of his office. *United States v. Gay*, 2 *Gallis*. 359.

72. A merchant vessel from which goods are unladen without a permit, after her arrival within the limits of the *United States*, but before she has reached her port of destination, is not liable to forfeiture under the act of Congress, passed March 2, 1799. *United States v. The Hunter*, 1 *Peters' C. C. R.* 10.

73. No exertions which one may make to procure the condemnation of a vessel under a supposition that he is entitled to a part of the penalty as informer, can constitute him an informer, unless he actually gave the information which led to the seizure. *Brewster v. Gelston*, 1 *Paine*, 426.

74. Where goods are labelled under the 67th section of the law for the collection of duties for disagreeing with the entries, and the claimant sets up mistake as an excuse. The circumstance that probable cause of seizure has been made out, does not impose on the claimant the necessity of making out an unusually clear case of mistake. All he has to do is to produce ordinary proof. *United States v. 9 Packages of Linen*, 2 *Wash. C. C. R.* 129.

75. It is not necessary that the officers of the Revenue Cutter should, when they give information, make a claim for a part of the forfeiture; or that they should take any part in the prosecution of the case, to entitle them to a portion of the proceeds. *Sawyer et al. v. Steele*, 3 Wash. C. C. R. 465.

76. Nor is it necessary that their commissions should be given in evidence. It is sufficient for them to prove that they acted on board as officers. *Id.*

ADMIRALTY III.

Admiralty Practice.

77. In all proceedings *in rem*, on an appeal, the property follows the cause into the Circuit Court, and is subject to the disposition of that Court. But it does not follow the cause into the Supreme Court, on an appeal to that Court. *The Collector*, 6 Wheat. 194.

78. After an appeal from the District to the Circuit Court, the former Court can make no order respecting the property, whether it has been sold, and the proceeds paid into Court, or whether it remains specifically, or its proceeds remain, in the hands of the Marshal. *Id.*

79. It is a great irregularity for the Marshal to keep the property, or the proceeds thereof, in his own hands, or to distribute the same among the parties entitled, without a special order from the Court; but such an irregularity may be cured by the assent and ratification of all the parties interested, if there be no *mala fides*. *Id.*

80. An Admiralty suit, where an appeal has been taken from the Circuit Court to this Court, but not prosecuted, will be dismissed, upon producing a certificate from the Court below, that the appeal has been taken, and not prosecuted. *The Jonquille*, 6 Wheat. 452.

81. Where the libel is so informal and defective, that the Court cannot enter up a decree upon it, and the evidence discloses a case of forfeiture, this Court will not amend the libel itself, but will remand the cause to the Court below, with directions to permit it to be amended. *The Mary Ann*, 8 Wheat. 380.

82. In case of seizures made *on land* under the revenue laws, the District Court proceeds as a court of common law, according to the course of the Exchequer on informations *in rem*, and the trial of issues of facts is to be by jury; but in cases of seizures *on waters navigable from the sea by vessels of ten or more tons burthen*, it proceeds as an Instance Court of Admiralty, by libel, and the trial is to be by the Court. *The Sarah*, 8 Wheat. 391. 394.

83. A libel charging the seizure to have been made *on water*, when in fact it was made *on land*, will not support a verdict, and judgment or sentence thereon; but must be amended or dismissed. The two jurisdictions, and the proceedings under them, are to be kept entirely distinct. *Id.* 394.

84. Note on the jurisdiction of the Instance Court in revenue causes. *Id.* Note a. 396.

85. The probable profits of a voyage, either upon the cargo or freight, do not form an item for the computation of damages, in cases of marine torts. *The Apollon*, 9 Wheat. 376.

86. Where the property is restored after a detention, demurrage is allowed for the detention of the ship, and interest upon the value of the cargo. *Id.* 377.

87. Where the vessel and cargo have been sold, the gross amount of the sales, with interest, is allowed; and an addition of 10 per cent. sometimes made, where the property has been sold under disadvantageous circumstances. *Id.* 377.

88. Counsel fees may be allowed, either as damages or costs, both on the Instance and Prize side of the Court. *Id.* 379.

89. A libel of information does not require all the technical precision of an Indictment at Common Law. If the allegations describe the offence, it is all that is necessary; and if founded upon a statute, it is sufficient if it pursues the words of the law. *The Emily and the Caroline*, 9 Wheat. 381.

90. Stating a charge *in the alternative*, is good, if each alternative constitutes an offence for which the thing is forfeited. *Id.* 387.

91. The technical niceties of the common law are not regarded in Admiralty proceedings. It is sufficient, if an information set forth the offence so as clearly to bring it within the statute upon which the information is founded. It is not necessary that it should conclude *contra formam statuti*. *The Merino et al.* 9 *Wheat.* 391. 401.

92. The claims of seamen, for wages, and of material men, for supplies, where the parties were innocent of all knowledge of, or participation in, the illegal voyage, preferred to the claim of forfeiture on the part of the government. *Id.* 416.

93. Material men have a lien, which may be enforced by a proceeding in the Admiralty, *in rem*, for necessities or supplies, furnished in a port to which the vessel does not belong. *Id.* 417.

94. In judicial sales there is no warranty express or implied. *The Monte Allegre*, 9 *Wheat.* 616. 644.

95. Upon a sale by the Marshal, under an order of Court, no warranty is implied. *Id.* 645.

96. Neither the Marshal, nor his agent, the auctioneer, has any authority to warrant the article sold. *Id.* 645.

97. *Quære*, How far the Marshal is responsible to the vendee, in his private capacity, if he undertake to warrant, or to do what would imply a warranty in a private sale? *Id.* 645.

98. Upon an Admiralty proceeding, *in rem*, where the proceeds of the sales are brought into Court, they are not liable to make good a loss sustained by the purchaser, in consequence of a defect being discovered in the article sold. *Id.* 648. 649.

99. The Courts of the United States, proceeding as Courts of Admiralty and maritime jurisdiction, may issue the process of attachment to compel appearance, both in cases of maritime torts and contracts. *Munro v. Almeida*, 10 *Wheat.* 473.

100. Under the Process act of 1792, c. 137. [xxxvi.] s. 2. the proceedings in cases of Admiralty and maritime jurisdiction in the Courts of the United States, are to be according to the modified Admiralty practice in our own country engrafted upon the British practice; and it is not a sufficient reason for rejecting a particular process, which has been constantly used in the Admiralty Courts of this country, that it has fallen into desuetude in England. *Id.*

101. The process by attachment may issue, wherever the defendant has concealed himself or absconded from the country, and the goods to be attached are within the jurisdiction of the Admiralty. *Id.*

102. It may issue against his goods and chattels, and against his credits and effects in the hands of third persons. *Id.*

103. The remedy by attachment in the Admiralty, in maritime cases, applies even where the same goods are liable to the process of foreign attachment, issuing from the Courts of common law. *Id.*

104. It applies to the case of a piratical capture, and the civil remedy is not merged in the criminal offence. *Id.*

105. In case of default, the property attached may be condemned to answer the demand of the libellant. *Id.*

106. It is not necessary that the property to be attached should be specified in the libel. *Id.*

107. *It seems*, that an attachment cannot issue without an express order of the judge, but it may be issued simultaneously with the monition; and when the attachment issued in this manner, and in pursuance of the prayer of the libel, this Court will presume that it was regularly issued. *Id.*

108. In Admiralty proceedings, amendments are made in the Appellate Court, not only as to form, but as to matter of substance, as by the filing a new count to the libel; the parties being permitted, whenever public justice, and the substantial

merits require it, to introduce new allegations and new proofs: *non allegata allegare, et non probata probare*. *The Marianna Flora*, 11 *Wheat*. 1. 38.

109. If the amendment is made in the Circuit Court, the cause is heard and adjudicated by that Court, and (upon appeal) by this Court on the new allegation; but if the amendment is allowed by this Court, the cause is remanded to the Circuit Court, with directions to permit the amendment to be made. *Id.* 38.

110. Informations *in rem* are not criminal proceedings. *Anon*, 1 *Gallis*. 24.

111. An information for a statute forfeiture should conclude "against the form of the statute;" or, at least, refer to some subsisting statute authorizing the forfeiture. *The Nancy*, 1 *Gallis*. 67.

112. A mere conclusion of an information "against the form of the statute" will not cure the defect of material averments, to shew that of forfeiture has accrued. *Id.*

113. It is no objection to the allowing of an amendment, in an information *in rem*, that it might affect the rights of sureties. *The Harmony*, 1 *Gallis*. 125.

114. A respondent in the Admiralty, who would take advantage of the statute of limitations, must plead it. *Brown v. Jones*, 2 *Gallis*. 477.

115. Shipping articles, being the proper and usual documents of the ship for the voyage, are in the Admiralty, always admitted as evidence of the terms of hire, even of the master, or his apprentice; but the evidence is not conclusive. *Willard v. Dorr*, 3 *Mason*, 161.

116. Courts of Admiralty do not take notice of set-offs, except so far as they grow out of a maritime contract, submitted to its cognizance, and then principally by way of diminishing compensation, and not as an independent right. *Id.* *Ship Mentor*, 4 *Mason*, 84.

117. In the Admiralty where the factor and the persons claiming a derivative title under the owner, contest the right to the proceeds, the Court will decide upon the equities of all concerned, and decree the amount of the lien to the factors, and the residue of the proceeds to the other claimants. If in such a case, a factor sets up a title as general owner, and not merely for a lien, he will not be entitled to costs. *The Ship Packet*, 3 *Mason*, 334.

118 Courts of Admiralty will not entertain suits upon stale demands. Twelve years delay, unexplained, will affect a demand with the imputation of staleness. *Willard v. Dorr*, 3 *Mason*, 161.

119. The master of a ship may entertain a suit in the Admiralty *in personam* against the owner, but not *in rem* against the ship, for he has no lien. *Id.*

120. To make pilotage a lien on the ship, the contract must have been made by some person in the employment of the owner, duly authorized to make the contract, such as the master, or the quasi master. But mere wrong doers, or mutineers, have no authority to bind the ship. *The Anne*, 1 *Mason*, 508.

121. After process served in proceedings *in rem*, the thing is decreed in the custody of the Court, though in the actual possession of the collector, &c. under the act of 1799. *Burke v. Trevitt*, 1 *Mason*, 96.

122. Custody fees will, in the first instance, be paid out of the proceeds in Court, on application of the party entitled to them. But in cases of condemnation, they are chargeable on the claimant, as a part of the taxable costs. *The Langdon Cheeves*, 2 *Mason*, 58.

123. If a bond taken on the delivery of the property on bail, be void, as not conforming to the law, the Court will enforce a re-delivery of the property by attachment. *The Struggle*, 1 *Gallis*. 476.

124. The 89th section of the act, 1799, ch. 128, does not extend to delivery on bail, on seizures under other acts. *Id.*

125. *Semble*, that on a bail-bond or stipulation judgment cannot be rendered until after twenty days from the decree of condemnation, and then in open Court. *McLellan v. United States*, 1 *Gallis*. 227.

126. The report required by the 30th sect. of the collection law must be made, as well when the vessel arrives from necessity, as when voluntarily, and whether

the port be her intended port of discharge or not. *United States v. Webber*, 1 *Gallis*. 392.

127. On a bond or stipulation in the Admiralty, for securing the property, a summary judgment may be rendered. *The Alligator*, 1 *Gallis*. 145.

128. The Clerk is entitled to his commissions upon money deposited in a bank, subject to the order of the Court, in the same manner as if actually paid into his hands. *Ex parte, Prescott*, 2 *Gallis*. 146r

129. In cases of claims on proceeds in the custody of the Court, where other parties are entitled, no attorney's fee, or other costs beyond the actual charges of Court, can be allowed. *The Jerusalem*, 2 *Gallis*. 350.

130. Where the subject matter is not within the jurisdiction of the Court, the exception may be taken under the general issue. *Maisonnaire v. Keating*, 2 *Gallis*. 345.

131. Money deposited in a bank, under a decree and subject to the order of the Court, is, "money deposited in Court," within the meaning of the act of 1793, ch. 20, sect. 2. *Ex parte, Prescott*, 2 *Gallis*. 146.

132. If the claimant does not show a good title to the property, it will not be restored to him, although not condemned as forfeited. But it will be retained in the registry until the real owner appears and proves his title. *The Eliza*, 2 *Gallis*. 4.

133. In causes on the instance side of the Admiralty, the answer of the claimant should be verified by oath; and in a suit for wages the libellant may compel the adverse party to answer interrogatories. *Gammell v. Skinner*, 2 *Gallis*. 45.

134. In suits for wages interest is allowed from the time of demand; and if no demand is proved, from the commencement of the suit. *Id.*

135. An attested copy of a bottomry bond, executed in a distant foreign country, being produced by the libellant, a continuance was allowed, under the circumstances, to enable him to procure the original. *The Jerusalem*, 2 *Gallis*. 191.

136. A general prize allegation cannot be properly joined with an information on a seizure for the violation of a statute. *The Dimon*, 2 *Gallis*. 806.

137. Practice as to costs and charges where several parties intervene for separate interests. *The Louisetta*, 2 *Gallis*. 307.

138. Where a party claims under an attachment, he must file a caution in Court, to hold the proceeds remaining after satisfying prior claims. *Id.*

139. Trespass will not lie upon a taking as prize. *Quære*, If it can properly be maintained for any marine tort? *Maisonnaire v. Keating*, 2 *Gallis*. 342.

140. The Court has power to discharge the jury empannelled to try the issue in a criminal cause, whenever it is necessary for the purposes of justice; and there is no exception of capital cases. *United States v. Coolidge*, 2 *Gallis*. 364.

141. In every case of a motion to the Court for a *cassetur*, the facts, on which it is grounded, must be proved by affidavit. *Id.*

142. When several persons are charged in one indictment, with the same offence, each defendant has a right to be tried separately. *United States v. Sharp et al.* 1 *Peters' C. C. R.* 118.

143. An indictment, which charges in the same count, an offence made capital by one section of an act of Congress, and another offence, declared in another section of the same law, to be a misdemeanor, is bad. *United States v. Sharp et al.* 1 *Peters' C. C. R.* 131.

144. When a libel is filed, claiming a forfeiture of the vessel libelled, and the facts of the case do not authorize the forfeiture alleged in the libel, but show an offence against other provisions of the same law, under which the forfeiture is asserted to have arisen, the Court will dismiss the libel. *United States v. The Hunter*, 1 *Peters' C. C. R.* 10.

145. The Circuit Court will issue *Letters Rogatory*, for the purpose of obtaining testimony, when the government of the place where the evidence is to be obtained, will not permit a commission to be executed. *Nelson et al. v. United States*, 1 *Peters' C. C. R.* 235.

146. After affirmance of the sentence of condemnation of the District Court,

for a breach of the revenue or non-importation laws, the Court will, forthwith, on motion, give judgment against the claimant and his sureties, on the bond given upon the delivery of the cargo to him, at the appraised value. *Id.*

147. An information *in rem* against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an Admiralty proceeding, and does not require a trial by jury. *Clark v. United States*, 2 Wash. C. C. R. 519.

148. Where a neutral vessel was plundered of her papers by a privateer, in consequence of which she was seized by another belligerent, and proceeded against as prize, but made a compromise with her captors and paid a ransom and costs: Holden, that the owners of the privateer were not liable for those items, (there being no privity to the compromise,) nor for any other injurious consequences flowing from the compromise. *The Amiable Nancy*, 1 Paine, 111.

149. The rule of damages, in cases of marine trespass, is the full value of the property injured or destroyed. A claim for loss of voyage rejected. *Id.*

150. Vindictive damages not allowed against the owners of a privateer, for trespasses committed by the crew. Whether the owners are liable at all for trespasses on the person. *Quære? Id.*

151. After a decree, and a writ of error lodged, an application for a review of the decree is too late. *M'Grath v. The Candalero*, Bee, 62.

152. Money or goods in the hands of the Marshal by order of this Court are subject to any further order of this Court; and claim may be made to the same, after a decree. Not so, if the money has been paid over. *Coulter v. The Cargo of the Esperanza*, Bee, 97.

153. Evidence to acquit or condemn in a case of breach of neutrality, must in the first instance come from the vessel taken, the persons on board, and the examination on oath of the master and other officers. *The Betty Cathcart*, Bee, 292.

154. Courts of Admiralty cannot properly apply to maritime contracts the same strictness that prevails at common law. If a vessel be intended to cruise as well as trade, the seamen's articles must be construed with reference to this double object. *Ship Bellona*, Bee, 106.

155. In an indictment for a statute offence, it is sufficient if the offence is substantially set forth, though not in the exact words of the statute. *United States v. Bachelder*, 2 Gallis. 15.

ADMIRALTY IV.

Criminal Jurisdiction of the Admiralty.

156. To make a man a principal in murder, it is not necessary that he should inflict the mortal wound. It is sufficient, if he be present, aiding and abetting the act. Nor is it necessary that there should be a particular malice against the deceased. It is sufficient, if there be deliberate malignity and depravity in the conduct of the party. *United States v. Ross*, 1 Gallis. 624.

157. If a number of persons conspire together to do an unlawful act, and death happen in the prosecution of the design, it is murder in all. If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happen collaterally, or beside the principal design. *Id.*

158. If several persons conspire to seize with force and violence a vessel, and run away with her; and, if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present, aiding and abetting in executing the design. *Id.*

159. If a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who, notwithstanding, compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast, and is drowned thereby, and his death was occasioned by such misconduct in the master, under such circumstances, it is murder in the

master. If there be no malice in the master, the crime is reduced to manslaughter. *United States v. Freeman, 4 Mason, 505.*

160. The law of the United States declares that murder committed on the high seas, shall be tried in the District where the offender is apprehended, or into which he is first brought: and therefore the Circuit Court has jurisdiction over a case, arising under the authority of the United States. *United States v. Magill, 1 Wash. C. C. R. 463.*

161. To constitute the offence of *murder*, under the law of the United States, cognizable in the Circuit Court of the United States, not only the *stroke*, but the *death*, must happen on the high seas. *Id.*

162. The master of a vessel, while at sea, has a right to give a seaman moderate correction; and in case of mutinous conduct, he may suppress it in the best mode he can, and therefore use a greater degree of violence than when there is misbehaviour only. *United States v. Wickham, 1 Wash. C. C. R. 316.*

163. Indictment for casting away and destroying a vessel of which the defendant was owner, with intent to prejudice the underwriters. The defendant has a right to challenge 35 of the jurors; the number of challenges allowed at common law, in capital cases. *United States v. Johns, 1 Wash. C. C. R. 363.*

164. The law not making it an offence in the *owner* to destroy his *vessel*, to the prejudice of the underwriters *on the cargo*, no evidence can be given to establish a charge against the defendant, for such destruction, to the prejudice of the underwriters *on the cargo*; even if such a charge was contained in the indictment. Evidence of the value of the property insured, may be given, for the purposes of showing inducements to destroy or to preserve it. *Id.*

165. The prosecutor must show that the insurance was a valid insurance; and if made by an incorporated company, the act of incorporation must be shown; and it must be shown that the contract of assurance was executed, so as to bind the company. *Id.*

166. Indictment for piracy committed on a Spanish vessel by the defendants, the first lieutenant and subaltern officers of the American privateer *Revenge*. 3 *Wash. C. C. R. 228.*

167. As there is no proof that in the first instance any unlawful acts were meditated by the commander of the *Revenge* and his officers, it will not be sufficient to prove acts of robbery committed by him and his crew generally—it must be proved that the defendants participated in the undertaking, and that they did it feloniously. *United States v. Jones et al. 3 Wash. C. C. R. 228.*

168. Indictment for manslaughter, committed by the master of an American ship, on a seaman, in the river off Wampoa in China. 3 *Wash. C. C. R. 515.*

169. A man may oppose force to force in defence of himself, his family, or property, against one who manifestly endeavours, by surprise or violence, to commit a felony. The intent of the person resisted must be to commit a felony, or the killing will not be justified. *United States v. Willberger. 3 Wash. C. C. R. 515.*

170. No words or gestures, however irritating, will justify the killing; although they may reduce the offence from murder to manslaughter. *Id.*

171. The intent to commit the felony must be *apparent*—the damage must be *imminent*, and the resistance used *necessary* to avert the damage. *Id.*

172. *Quere*, Whether this offence, which was committed on a river, was within the jurisdiction of the Circuit Court of the United States, according to the provisions of the act of Congress? *Id. Eloide, Wheaton, 5. 76.*

173. A prisoner, charged with having committed murder on board of a British ship of war, on the high seas, was delivered over to the British Consul, agreeably to the 27th article of the treaty with Great Britain. *United States v. Nash, Bee, 266.*

Et vide CONSTITUTIONAL LAW IV.

COURTS OF THE UNITED STATES.

PRIZE.

SALVAGE.

SHIPPING.

STATUTES OF THE UNITED STATES.

AGREEMENT.

- I. (B) *What constitutes an agreement.* (C) *Construction of particular agreements.*
- II. (A) *Agreements by public agents.* (B) *Agreements by private agents.*
- III. *Consideration.*
- IV. *What renders an agreement void.*
- V. *Extinguishment of a contract.*

AGREEMENT I.

(B) *What constitutes an agreement.*

1. There is no principle of law, which will sanction an action by the creditor, against the debtor of his debtor, upon the ground of contract; for there is no privity, between them. *The King of Spain v. Oliver*, 1 Peters' C. C. R. 276.

2. Where an allowance is made to a party as a compensation, up to a certain period, for his services as treasurer of a society, which is accepted by him without objection, it is conclusive as an adjustment for such services, especially if the party making the allowance was authorized to fix that compensation. *Oliver v. Vernon*, 4 Mason, 275.

3. If subsequent services of a like nature are rendered, the party is entitled to a compensation, unless it is clearly established that he meant them to be voluntary. *Id.*

4. The mere settlement of an account, does not in itself constitute an agreement, or amount to a contract; though it may be evidence of a contract. *Peterson v. United States*, 2 Wash. C. C. R. 36.

(C) *Construction of particular agreements.*

5. In general, a sum of money in gross, to be paid for the non-performance of an agreement is considered as a *penalty*, and not as *liquidated damages*. *Taylor v. Sandisford*, 7 Wheat. 13. 17.

6. *A fortiori*, where it is expressly reserved as a penalty. *Id.* 17.

7. Thus where in a building contract, the following covenant was contained: "The said houses to be completely finished on or before the 24th of December next, under a penalty of 1000 dollars, in case of failure." It was held that this was not intended as liquidated damages for the breach of that single covenant only, but applied to all the covenants made by the same party in that agreement; that it was in the nature of a penalty, and could not be set off in an action brought by the party to recover the price of the work. *Id.* 17.

8. An agreement to perform certain work within a limited time, under a certain penalty, is not to be construed as liquidating the damages which the party is to pay for the breach of his covenant. *Id.* 17.

9. Where the acts stipulated to be done, are to be done at different times, the covenants are to be construed as independent of each other. *Goldsborough v. Orr*, 8 Wheat. 217. 225.

10. When no specific time is fixed for the payment of money, in a contract by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. *The Bank of Columbia v. Hagner*, 1 Peters, 468.

11. In a marriage settlement it was provided, that after the death of the husband, the trustees named in the settlement should stand possessed of a bond executed to them by the husband, and of the sum of \$37,038 to be received by them; upon trust to place out the same when it shall come into their hands, at interest, on freehold securities, or invest it, or any part of it, in the purchase of stock of the United States of North America, or bank stock there, *with the approbation of the wife*;

and to call in and replace, and re-invest the same, and the produce thereof, from time to time, upon or in such securities, or stock, *with the approbation of the wife.*

It is not an unreasonable interpretation to say, that the wife, who survived the husband, was to have a controlling agency, within the limitation prescribed by the contract. She has not an arbitrary and unlimited discretion. The investment is restricted to three objects: freehold securities, United States stock, or bank stock; and the trustees are not authorized to make any other investment. The trustees are bound to make the investment in any one of the funds mentioned, which the wife might elect or request. *English et al. v. Foxall, 2 Peters, 595.*

12. The husband, by his will, confirmed the marriage settlement, and he further directed "that if the sum of \$37,038 secured to be paid to the trustees, should, at any time be found insufficient to raise and bring into the hands of the trustees the clear annual sum of \$2,222.22, the annuity secured to be paid to his wife by the settlement, then the trustees of his will shall, from time to time, transfer to themselves, as trustees of the settlement, out of the residuum of his estate, such sum or sums of money as may, from time to time, be found necessary to make up any deficiency there may happen to be between the current amount of the interest and produce of the principal sum, and the amount of the annuity; so that, in no event, less than \$2,222.22 shall be raised annually for his wife, or for her benefit in the United States.

The wife directed that the \$37,038 should be invested in six per cent. stock of the United States, which was insufficient to raise the stipulated annuity, and claimed that the deficiency should be made up from the residuum of the estate. The wife had a right to claim this deficiency to be made up. *Id.*

13. Where a sale is made of goods, and they are delivered, and an agreement is afterwards made to rescind the contract, the contract is not completely rescinded until a re-delivery of the goods. *Miller v. Smith. 1 Mason, 437.*

14. The parties to a parol agreement, which by the understanding between them is to be reduced to writing, cannot escape from its obligations, by refusing to execute the written instrument, or to proceed further therewith.—*Blight v. Ashley et al. 1 Peters' C. C. R. 16.*

15. All contracts made for equipping and fitting a cartel, are to be considered as contracts made between friends, and ought to be enforced in the tribunals having jurisdiction thereof. *Crawford et al. v. the William Penn. 1 Peters' C. C. R. 106.*

16. Where the defendant contracted to deliver teas of the first quality, he is not excused from a performance of his undertaking, by proving that no such teas could be obtained at the market. He is answerable to the plaintiff in damages, for the non-performance of such agreement. *Yonqua v. Nixon et al. 1 Peters, C. C. R. 221, S. P. Gilpins v. Consequa, 1 Peters' C. C. R. 83.*

17. The same construction must be given, and the same consequences will follow from verbal representations, made at the time of a parol agreement, as, had they been inserted in a written agreement, a Court of Equity would assign to them. *Thompson v. Tod. 1 Peters' C. C. R. 380.*

18. One proposed to the plaintiffs, in the presence of the defendant, to ship them a quantity of sugars belonging to him, in the defendant's hands, on receiving an authority to draw on the plaintiffs for the amount. It was thereupon agreed that the shipment should be made, and the authority given, on the defendant's engaging by letter to ship the sugars. The owner of the sugar accordingly wrote a letter, addressed to the defendant, desiring him to ship the sugars on board such vessel as the owner might direct, consigned to the plaintiffs, and next day handed it to him. The defendant wrote "agreed to" under the letter, and signed his name beneath; upon which the authority to draw was given: held that the defendant's undertaking was an original part of the entire transaction, and that the consideration moving from the plaintiffs to the owner of the sugars, which was not expressed in the letter, might be proved by parol, as it did not contradict the written agreement; and that the undertaking of the defendant required no consideration moving from the plaintiffs to him to support it. *Rabaud v. D'Wolf, 1 Paine, 580.*

AGREEMENT.

19. The owner of the sugars becoming insolvent, wrote the plaintiffs, informing them, that the vessel which he had intended should take the sugars would not do so, and that they were at liberty to make any arrangements with the defendant for the interest of all concerned: *Held*, that this was an authority under which the plaintiffs could nominate a vessel, and that the defendant was bound to ship the sugars in such vessel, if he did not choose to appoint another. *Id.*

20. Action of covenant under an agreement under seal, by which the plaintiff stipulated to perform, in the Philadelphia and Baltimore theatres, for three years, and not to play or sing at any other theatre, without the license of the defendant; and the defendant agreed to pay the plaintiff so much per week, and to allow him the profits of a benefit and a half each season, provided the plaintiff kept and performed all his covenants, and not otherwise. *Held*, that

21. Where the covenants are dependant, the plaintiff cannot support his action as to them, without showing performance of every affirmative covenant on his part, and in such a case it is competent to the defendant to prove a breach of such as are negatived. *Webster v. Warren*. 2 Wash. C. C. R. 456.

22. Action of covenant upon an agreement under seal, entered into in 1804, in which the defendant bound himself to pay to the plaintiff two notes of 1,250 dollars each, and an unliquidated demand, when it should be liquidated, forthwith; after the defendant should obtain, or be in a legal capacity to obtain the lawful possession of the Georgia lands conveyed by him to E. C. The declaration averred, that on, and ever since the 1st of May, 1806, the defendant was in the legal capacity to obtain, &c.; and on this issue was joined. *Held*, that until the defendant was in the legal capacity to obtain possession of the lands, the plaintiff's claim was suspended; and, as soon as the capacity existed, the plaintiff's right accrued; although the defendant did not choose to obtain, or endeavour to obtain the possession. *Bleeker v. Bond*, 3 Wash. C. C. R. 529.

23. The mortgagee of the defendant, as the agent of the defendant, having received from the United States, compensation for the lands conveyed to the defendant by E. C.; and he having conveyed the land to the United States, they being part of the Yazoo lands, the defendant is estopped thereby, from denying his legal capacity to obtain possession of the lands. *Id.*

24. An agreement in the shipping articles that no officer or seaman should demand or be entitled to his wages, or any part thereof, until the return of the vessel to the port of outfit, does not amount to a contract that the risk shall be insured, or the arrival guaranteed, by the mariner; but is simply an agreement that such wages, as were legally due at a foreign port, should be paid only at the port of outfit. *Johnson v. The Lady Walterstoff*, 1 Adm. Decis. 215.

25. The agreement of the parties may control the general operation of law; but the agreement must be clear, and incapable of doubtful import. *Id.*

AGREEMENT II.

(A) *Agreements by public agents.* (B) *Agreements by private agents.*

(A) *Agreements by public agents.*

26. Where in a contract with the Secretary of War, for supplying the troops of the United States with provisions, specific prices are stipulated for rations issued at certain places mentioned in the contract; and it is further provided, that "should any rations be required at any places not specified in the contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor;" if the parties cannot agree upon the price for the rations thus required, a reasonable compensation is to be allowed, and is to be proved by competent evidence, and settled by a jury; and the contractor, upon the trial, is at liberty to show, that the sum al-

lowed by the Secretary at War is not a reasonable compensation. *United States v. Wilkins*, 6 *Wheat.* 135.

27. Under the 3d and 4th sections of the act of the 3d of March, 1797, c. 74, the defendant is entitled, at the trial, to the full benefit of any credit in his favour, whether arising out of the particular transaction for which he was sued, or out of distinct and independent transactions, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. *Id.*

28. Where an agent of the War Department was empowered to make a contract, which reserved no right of ratification to the Secretary, it was held complete and binding without such ratification. *United States v. Tillotson*, 1 *Paine*, 305.

(B) *Agreement by private agents.*

29. If an agent to collect and receive payment of bills, transmit them to his own private agent, to receive the money and place the amount, when received, to his private credit, payment to such agent is payment to the original agent; and if there be a failure, it is the loss of the latter, and not of his principal. *Taber v. Perrot*, 2 *Gallis*. 565.

30. *A fortiori*, this applies, where the money has been drawn for by a bill in favour of a third person, which has been accepted before the failure. *Id.*

31. Where two of three assignees of a bankrupt enter into an agreement, in the absence of the third, the contract is not binding upon the absent assignee, unless he had previously given authority to make it, or subsequently recognized and acknowledged it. *Aliter* among partners. *Blight v. Ashley, et al.* 1 *Peters' C. C. R.* 16.

32. Compensation to an agent for the sale and management of estates, the property of absent proprietors. *The Committee of the West-Jersey Society, v. Morris*, 1 *Peters' C. C. R.* 59.

33. The defendant had sold the complainant a bill of exchange on a house in London, and received the complainant's note for the price, but kept the bill by agreement, as security for its payment. The bill was protested, the drawers became bankrupt, and dividends were declared upon their estates. The defendant refused to return the bill to the complainant, but made no effort to recover the amount or to obtain the dividends. He was held liable for any loss that might have happened by such negligence. *Childs v. Corp.*, 1 *Paine*, 286.

AGREEMENT III.

Consideration.

34. Where a contract grows immediately out of, and is connected with, an illegal or immoral act; a court of justice will not lend its aid to enforce it. *Armstrong v. Toler*, 11 *Wheat.* 258. 268.

35. So if the contract be in part only connected with the illegal consideration, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it. *Id.* 269.

36. But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. *Id.*

37. Thus where A, during a war, contrived a plan for importing goods on his own account from the enemy's country, and goods were sent to B by the same vessel; A, at the request of B, became surety for the payment of the duties on B's goods, and became responsible for the expenses on a prosecution for the illegal importation of the goods, and was compelled to pay them. *Held* that A might maintain an action on the promise of B to refund the money. *Id.*

38. But if the importation is the result of a scheme between the plaintiff and defendant, or if the plaintiff has any interest in the goods, or if they are consigned to him with his privity, in order that he may protect them for the owner, a promise

to repay any advances made under such understanding or agreement is utterly void. *Id.*

39. The act of defending a prosecution for an unlawful importation, and contracts growing out of the defence, independent of the unlawful importation itself, are legal and valid. *Id.* 273.

40. No action can be maintained against a master and part owner of a ship engaged in the slave trade, by his partners in the joint concern; nor against an agent, who is party to the original illegal traffic, and has the proceeds in his hands. *Fales v. Mayberry*, 2 *Gallis*. 560.

41. If a ship be sold in a foreign port, to evade a forfeiture incurred to the United States, no action can be sustained for the proceeds. *Id.*

42. An agent, who is party to an illegal transaction, and has in his hands the proceeds, may set up such illegality against the action of any party concerned with him. *Id.*

43. Contracts made with an alien enemy, are lawful, if made in a trade carried on under license of the government, whether they arise directly, or collaterally, out of such licensed trade; or, if the enemy with whom the contract is made, be in the hostile country by license of the government; or if the contract be a ransom bond. *Crawford et al. v. The William Penn*, 3 *Wash. C. C. R.* 484.

44. Contracts made by prisoners of war, in the enemy's country, for subsistence, are binding. *Id.*

45. A foreigner is not always bound to take notice of the revenue laws of a country to which he does not belong; and a firm and final contract, made in his own or a foreign country, is valid, although it may be intended to violate the revenue laws of a country with the property obtained from him by such contract, he not being acquainted with the intended fraud. *Aliter*, if the contract is to be completed in, or has a view to the violation of the laws of the country where it is to be executed. *The Executors of Cambioso v. Assignees of Maffett*, 2 *Wash. C. C. R.* 98.

AGREEMENT IV.

What renders an agreement void.

46. *Quære*, As to what concealment or suppression of material facts in a contract, where both parties have not equal access to the means of information, will avoid the contract? *Etting v. The Bank of the United States*, 11 *Wheat.* 59. 73.

47. A contract of insurance, made on a voyage which is opposed to the common statute or maritime laws of the country where it is effected, is void. *Craig v. U. S. Ins. Co.* 1 *Peters' C. C. R.* 410.

AGREEMENT V.

Extinguishment of a Contract.

48. A covenant, under seal, to come to a settlement within a limited time, and to pay the balance which might be found due, is merely collateral, and cannot be pleaded as an extinguishment of a simple contract debt, the period within which the settlement was to be made having elapsed before the commencement of the suit, and the plea not averring that any such settlement had been made. *Baits v. Peters*, 9 *Wheat.* 556.

49. The official bond given by a receiver of public moneys, does not extinguish the simple contract debt arising from a balance of account due from him to the United States. An action of assumpsit for the balance of account, and an action of debt upon the bond against the principal and sureties, may be maintained at the same time. *Walton v. United States*, 9 *Wheat.* 651.

50. A state of war puts an end to all executory contracts between the citizens of the different countries. *The Francis and Cargo*, 1 *Gallis*. 448.

51. Where higher security is given by the debtor, *prima facie* the law presumes it intended as an extinguishment of the debt. *Aliter*, where it is the bond of a third person. *United States v. Lyman*, 1 *Mason*, 482.

52. When two or more persons are liable for a simple contract debt, a judgment obtained against one, is an extinguishment of the claim on the other debtors, in the same manner as a bond, given by one or two persons liable on a simple contract, is an extinguishment of the original debt. *Willings et al. v. Consequa*, 1 *Peters' C. C. R.* 301.

53. If the vendor of property accept of a note or bill in satisfaction of his debt, he cannot sue his original debtor, provided there was no fraud or unfairness on the part of the vendee. *Parker v. United States*, 1 *Peters' C. C. R.* 262.

54. If the vendor without an agreement to receive the note of the vendee in payment, take such note and transfer it, his right of action on the contract of sale is taken away as long as the note is out of his possession ; and he can only sue on the contract when he gets back the note, and has it in his power to return it to the vendee. *Id.*

55. A bond given to secure the payment of duties on imported goods is not an extinguishment of the debt ; but merely security for the payment. *United States v. Lyman*, 1 *Mason*, 482. *Sed vide contra*, 3 *Wash. C. C. R.* 508. *U. States v. Ashley*, where it was held that though both partners in a firm were bound on the importation of goods, for the duties, yet a bond given by one, extinguished this obligation, and made it his separate debt.

Et vide ASSUMPSIT.

BAILMENT.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

CHANCERY.

CONSTITUTIONAL LAW III.

CORPORATION II.

FRAUDS.

GUARANTY.

INSURANCE.

LEX LOCI.

LIMITATION OF ACTIONS I.

LOCAL LAW.

PARTNERSHIP.

SALE.

SHIPPING.

USURY.

ALIEN.

I. Effects of alienage. (A) *Disability of an alien; when he may take lands, and when and how his title will be divested.* (B) *Effects of the American revolution, and of the British treaties of 1783 and 1794, on the estates and titles of British subjects.* (C) *Effects of the French treaties of 1778 and 1800, on the estates and titles of French subjects.*

II. Naturalization.

ALIEN I.

Effects of alienage. (A) *Disability of an alien; when he may take lands, and when and how his title will be divested.* (B) *Effects of the American revolution, and of the British treaties of 1783 and 1794, on the estates and titles of British subjects.* (C) *Effects of the French treaties of 1778 and 1800, on the estates and titles of French subjects.*

(A) *Disability of an alien; when he may take lands, and when and how his title will be divested.*

1. An Alien may take real property, by grant, whether from the state or an individual, and may hold the same until his title is divested by an inquest of office, or some equivalent proceeding. *Gouverneur's Heirs v. Robertson*, 11 Wheat. 332. 351.

2. Examination of the authorities upon the question, whether a grant of lands to an alien, by the state, is absolutely void. *Id.* 351.

3. An alien enemy cannot sustain a suit in the Courts of the United States. *Mumford v. Mumford*, 1 Gallis. 366.

4. An alien enemy cannot sustain a claim in a Prize Court; nor can a citizen claim the property of an enemy in a Prize Court upon an alleged sale since the war. *The cargo of the Emulous*, 1 Gallis. 563.

5. There is no legal difference as to the plea of an alien enemy, between a corporation and an individual. *Society, &c. v. Wheeler*, 2 Gallis. 105.

6. A person beneficially interested in a suit, if alien enemy, cannot support a suit in the name of his trustee who is not an alien. *Crawford et al. v. The William Penn*, 1 Peters' C. C. R. 116.

7. It is otherwise if the contract upon which suit is brought, arises out of a trade licensed by the government in whose Courts redress is sought; and enemy interest will not defeat such a suit. *Id.*

8. A usage to add interest at the end of the year, to the annual account, and interest on the balance, does not apply in a case in which the commercial intercourse between the two countries in which the parties reside, had ceased, when the account was transmitted; nor will it authorize the creditor to make other rests in the account. *Denniston et al. v. Imbrie*, 3 Wash. C. C. R. 396.

9. If an alien enemy has an agent here, and this is known to the debtor, interest ought not to abate during the war. *Id.*

(B) *Effects of the American revolution and of the British treaties of 1783 and 1794, on the estates and titles of British subjects.*

10. British subjects born before the revolution, are equally incapable with those born after, of inheriting or transmitting the inheritance of lands in this country. *Blight's lessee v. Rochester*, 7 Wheat. 535. 544.

11. The treaties of 1783, and 1794, only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired. *Id.* 544.

12. Actual possession is not necessary to give the party the benefit of the treaty ; but the existence of title at the time is necessary. *Id.* 545.

13. Where J. D., an alien and British subject came into the United States subsequent to the treaty of 1783, and before the signature of the treaty of 1794, died, seized of the lands in question : *Held*, that the title of his heirs was not protected by the treaties. *Id.* 544.

14. In what cases citizenship may be presumed so as to confirm a title to lands. *Id.* 545.

15. Under the 9th article of the treaty between the United States and Great Britain, of 1794, it is not necessary for the alien to show that he was in the actual possession or seisin of the land, at the date of the treaty which applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. The title of an alien mortgagee is protected by the treaty. *Hughes v. Edwards*, 9 *Wheat.* 489. 496.

16. But independent of the stipulations of the treaty, an alien mortgagee has a right to come into a Court of Equity, and have the property, which has been pledged for the payment of the debt, sold for the purpose of raising the money. His demand is merely a personal one, the debt being considered as the principal, and the land as an incident. *Id.* 497.

17. The alienage of the plaintiffs in ejectment cannot be set up to defeat a recovery where their ancestor held the lands at the time of the treaty of 1794. The circumstances of the special verdict's not finding the fact that he held them at that time not noticed. *Denn ex dem. Fisher v. Harnden*, 1 *Paine*, 55.

18. Interest on debts due by the citizens of the United States to the subjects of the King of Great Britain, ceased during the revolutionary war, and during the war of 1812 ; but the mere circumstance of war existing between two countries, is not a sufficient reason for abating interest upon the debts due by the subjects of one belligerent to the subjects of another. *Conn et al. v. Penn et al.* 1 *Peters' C. C. R.* 496.

19. Operation of the treaty of 1783, upon the exercise of legislative powers for the confiscation of the property of those who had been engaged in hostility against the United States ; or who neglected to surrender themselves, when called upon by law to do so. *Gordon v. Holiday*, 1 *Wash. C. C. R.* 285.

(C) *Effects of the French treaties of 1778 and 1800, on the estates and titles of French subjects.*

20. The treaty of 1778, between the United States and France, allowed the citizens of either country to hold lands in the other ; and the title, once vested in a French subject to hold lands in the United States, was not divested by the abrogation of that treaty, and the expiration of the subsequent convention of 1800. *Carneal v. Banks*, 10 *Wheat.* 181.

ALIEN II.

Naturalization.

21. An alien enemy cannot be permitted to make the declaration required by law preparatory to the naturalization of aliens. *Ex parte, Newman*, 2 *Gallis.* 11.

22. Under the act of April 14th, 1802, the registry of aliens, required by the second section of the law, must have been made five years before the application for naturalization. *Anonymous.* 1 *Peters' C. C. R.* 457.

23. The applicant must also prove the period of his residence in the United States, and also, the other matters required by the provisions of the section. *Id.*

24. Parol evidence of the arrival of an applicant for naturalization, five years previous to the application, is insufficient. *Id.*

ASSIGNMENT.

1. A debtor has a right to prefer one creditor to another in payment : and it is no objection to the validity of an assignment for that purpose, that it was made by the grantor, and received by the grantee, as trustee, in the hope and expectation, and with a view of preventing a prosecution for a felony connected with his transactions with his creditors : if the preferred creditors have done nothing to excite that hope, and the assignment was made without their knowledge, or concurrence at the time of its execution, and without a knowledge of the motives which influenced the assignor; or was not afterwards assented to by them, under some engagement, express or implied, to suppress or forbear the prosecution. *Brooks v. Marbury*, 11 *Wheat.* 78. 83.

2. An assignment for the benefit of preferred creditors is valid, although their assent is not given at the time of its execution, if they subsequently assent in terms, or by actually receiving the benefit of it. *Id.* 96.

3. It is no objection to such an assignment, that it defeats all other creditors of their legal remedies, even if amounting to a majority in number and value, unless there be some express provision of a bankrupt law to invalidate the deed. *Id.* 98.

4. *Quære*, How far, and under what circumstances, the possession of the property assigned to trustees for the benefit of creditors, continuing in the grantor, will invalidate the assignment? *Id.* 81.

5. Note collecting the cases upon the subject of voluntary assignment for the benefit of creditors. *Id.* Note a.

6. *Quære*, How far contingent and reversionary interests of the wife may be assigned by the husband? *Cassell v. Carroll*, 11 *Wheat.* 134. 151.

7. *It seems*, that an assignment, by the husband, of a debt actually and presently due and payable to the wife, divested, in equity, the title to the wife. *Id.*

8. An insolvent debtor has a right to prefer one creditor to another, in payment, by an assignment *bona fide* made, and no subsequent attachment, or subsequently acquired lien, will avoid the assignment. *Spring v. S. C. Ins.* 8 *Wheat.* 268. 282.

9. Such an assignment may include choses in action, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured in case of a loss. It is not necessary that the assignment should be accompanied by an actual delivery of the policy. *Id.* 268.

10. In general, it may be affirmed that mere personal *torts*, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of, and adhering to property, may pass by assignment. *Comigys et al. v. Vasse*, 1 *Peters*, 213.

11. The right to indemnity for an unjust capture, on the sovereign; whether remediable in his own Courts, or by his own extraordinary interposition, or grants upon private petition, or upon public negotiation; is a right attached to the ownership of the property itself, and passes by cession to the use of the ultimate sufferer; and is capable of assignment by him to others. *Id.* 215.

12. By the well settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods : and by his endorsement of the bill of lading to a *bona fide* purchaser for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by endorsement, and thus may pass the property. *Conard v. The Atlantic Insurance Company*, 1 *Peters*, 445.

13. Strictly speaking, no person but the consignee can by any endorsement on the bill of lading pass the legal title to the goods. But if the shipper be the owner,

ASSIGNMENT.

and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere endorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by endorsement on the bill of lading itself. Such an assignment by the owner, not only passes the legal title as against his agents or factors, but also against his creditors, in favour of the assignee. *Id.* 445.

14. Assignees of prize shares must be presumed to know the stipulations of the articles for the cruise, being put upon the inquiry by the very terms of the assignment. *The Brutus, 2 Gallis.* 551.

15. An assignment of property for the benefit of creditors is good against a subsequent attachment, although the creditors were not originally parties to the assignment, if they have in fact assented thereto before the attachment. *Brown v. Min-turn, 2 Gallis.* 557.

16. *Quære*, If such assent be necessary to make such an assignment valid against attachments of other creditors? *Id.*

17. An assignment, *with notice*, of a chose in action founded in illegality, will not protect the parties from the legal consequences attached to the original contract. *Fales v. Mayberry, 2 Gallis.* 560.

18. If a chose in action, *not negotiable*, be assigned, *without notice* of any fraud or illegality in its origin, the parties are not precluded from setting it up as a defence in the same manner as if there had been no assignment. *Id.*

19. In an action between the original parties, an assignment to a third person cannot be set up to defeat the defence of illegality in the original contract. *Id.*

20. Notice of an assignment of chattels in a judgment creditor, where possession has never been taken under the assignment, does not affect the right of the Sheriff or the creditor to seize the property in execution, as the property of the assignor. *Meeker v. Wilson, 1 Gallis.* 419.

21. A parol assignment of a share in prizes is void. *The Dash, 1 Mason,* 4.

22. Where A made an assignment of a vessel at sea, in trust to B, to indemnify B for endorsements, and also to pay the demands of certain other creditors named in the conveyance; *Held*, that the taking possession of the said vessel by B, in a reasonable time and manner after her return, would be a sufficient delivery and possession to support the assignment, although the creditors of A should attach the vessel before such possession was obtained. *Held*, also, that it was not necessary to the validity of the assignment, that the creditors should be technical parties to it, nor that their assent should in any manner be given to it at the time of its execution, if they assented before any attachment of the property. *Held*, further, that the assignment being for the benefit of the preferred creditors unconditionally, and without any stipulation for a release or otherwise, the law would, in such a case, presume the assent of the creditors. *Wheeler v. Sumner, 4 Mason,* 183.

23. On the general validity of assignments, made by a failing debtor for the benefit of creditors. *Halsey v. Whitney, 4 Mason,* 206.

24. An assignment for the benefit of all creditors is good against subsequent attachments, although all the creditors are not parties to the deed before the attachments. *Id.*

25. It is not a fraud upon any attaching creditor to provide for the payment of all the creditors in preference to one, who means to attach by process the property conveyed. *Id.*

26. The assent of creditors to an assignment, not stipulating for a release, may be presumed; *aliter* if release is stipulated for. *Id.*

27. *Quære*, Upon general principles, an assignment, stipulating for a release of the debtor, ought not to be deemed fraudulent, as locking up the debtor's property from his creditors, unless they consent to relinquish a part of their debts. *Id.*

28. A general assignment is valid for actual liabilities, as well as for debts due, if the parties so intend. *Id.*

AWARD.

1. An award must decide the whole matter submitted to the arbitrators : it must not extend to any matter not comprehended in the submission : and it must be certain, final, and conclusive, of the whole matter referred. *Carnochan v. Christie*, 11 *Wheat.* 446.

2. Where the arbitrators determined that the plaintiffs should be entitled to credit of a certain sum on account of sales of land to the defendant, provided "they shall grant, or cause to be granted, to the said W. C. (the defendant) a clear, unincumbered and satisfactory title" to the lands, without limiting any time within which the title should be made: *Held*, that the award was void, as not being final and conclusive. *Id.* 466.

3. A Court of Equity either enforces an award as it is made, or sets it aside if in any respect defective : but it is contrary to its practice to confirm the award so far as it extends, and to supply omissions by decree of the Court. *Id.*

4. There is a class of cases, upon awards, in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*. But the rule is to be understood with this qualification ; that in order to impeach an award, made in pursuance of a conditional submission, on the ground only of part of the matters in controversy having been decided, the party must *distinctly* show, that there were other points in difference, of which express notice was given to the arbitrators, and that they neglected to determine them. *Karthauss v. Ferrer et al.* 1 *Peters*, 227.

5. It is a settled rule, in the construction of awards, that no intendment shall be indulged, to overturn an award, but every reasonable intendment, shall be allowed, to uphold it. Thus, if a submission be of all actions, real and personal, and the award be only of actions personal, the award is good ; for it shall be presumed no actions real were depending between the parties. *Id.* 228.

6. The judgment of the arbitrators is conclusive upon all matters of fact. If however there be a mistake of fact apparent upon the face of the award ; or if the referees are satisfied of a mistake of fact, though not apparent in the face of the award, the award will be recommitted to rectify the mistake. But it is no ground to set aside the award. *Kleine v. Catara*, 2 *Gallis*. 61.

7. Referees are judges as well of the law as of the fact. Under a general submission the parties are presumed to agree to refer to them every thing, both as to law and fact, that is necessary for the decision. And under such a submission, they are not restricted to the dry principles of law, but may award according to equity and good conscience. *Id.*

8. If referees refer a point of law to the court, by spreading it on the award, and mistake the law, their award will be set aside. But if, admitting the law, they intentionally decide contrary thereto upon principles of equity, it is no ground to set aside the award. *Id.*

9. If they make a general award, it cannot be impeached collaterally, or by evidence *aliunde*, for mistake of law or fact ; for their judgment is conclusive in both respects, unless there be fraud or misbehaviour. *Id.*

10. If the submission be general, and the award be of a particular thing, it will be presumed that nothing else was in controversy, unless the contrary appear ; and in the latter case, the award will be recommitted. *Id.*

11. The award of commissioners appointed under the acts of Congress of the 31st of March 1814, ch. 98, and of the 23d of January, 1815 ch. 706, and of the 3d of March 1815, ch. 778, appointed to settle the claims of the *New England Mississippi Land Company*, and others to the *Yazoo* lands (so called) is not conclusive, as between the scrip-holders and the said company, as to their rights, derived under

the grants of certificates of shares in the stock of the company itself. The commissioners had no jurisdiction of any such question. *Gilman v. Brown*, 1 *Mason*, 191.

12. In what cases Courts will interfere, and set aside an award of referees. *Hurst v. Hurst*, 1 *Wash. C. C. R.* 56.

13. The Court will not set aside the report of referees, merely because they might not have drawn the same conclusions from the evidence, which the referees have deduced. *Jolly v. Blanchard*, 1 *Wash. C. C. R.* 252.

14. Evidence not laid before referees, cannot be exhibited to the Court on exceptions to the report. *Barton v. Anthony* 1 *Wash. C. C. R.* 317.

15. When facts to sustain an additional exception to the report of referees, have been discovered, since the period for filing exceptions has passed; the Court will allow the additional exception to be filed; although if no exceptions had been filed in time, the discovery of such circumstances would not induce the Court to allow them to be filed. *Thelasson v. Crammond*, 1 *Wash. C. C. R.* 319.

16. When after sundry meetings, and after every effort to obtain a coincidence of opinion among them, the third referee, who would not sign the award, withdrew, and declared that it would be unnecessary to call upon him, to meet on the subject of the reference again; the remaining two referees had a right to proceed, and make an award. *Kingston v. Kincaid et al.* 1 *Wash. C. C. R.* 448.

17. Plain mistakes in facts, which appear upon the face of the award, or which could be made out from the evidence laid before the referees, or for their examination, might have been taken advantage of by exceptions to the award; and these cannot afterwards be made the subject of a claim to relief in equity. *Hurst v. Hurst*, 2 *Wash. C. C. R.* 127.

BAILMENT.

1. The law regulating the responsibility of common carriers, does not apply to the case of carrying intelligent beings, such as negroes. The carrier has not, and cannot have over them the same absolute control that he has over inanimate matter. In the nature of things, and in their character, they resemble passengers, and not packages of goods. It would seem reasonable therefore that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods. *Boycs v. Anderson*, 2 *Peters*, 150.

2. The law applicable to common carriers is one of great rigour. Though to the extent to which it has been carried, and in the cases to which it has been applied, its necessity and its policy are admitted; yet it ought not to be carried further or applied to new cases. It has not been applied to living men, and it ought not to be. *Id.*

3. A bailee without reward is guilty of gross negligence if he omits that reasonable care of property committed to his charge, which persons in the like situation exercise, or which the bailee is accustomed to exercise in like cases. *Tracy v. Wood*, 3 *Mason*, 132.

4. Gross negligence is to be considered with reference to the nature of the goods delivered to a bailee without reward. If money is delivered, it is to be kept with more care than common property. *Id.*

5. The owner of a ship has no right, without necessity, to change the vehicle of conveyance of goods shipped on freight. *Trott et al. v. Wood*, 1 *Gallis*. 443.

6. An usage, to control this general principle, should be so uniform and general, that persons engaging in the trade may be considered as contracting with a reference to it; otherwise it ought not to affect the rights of the parties. *Id.*

BILLS OF EXCHANGE & PROMISSORY NOTES.

- I. *Form, requisites, and effect of a bill or note.*
- II. *Transfer and endorsement.*
- III. *Consideration.*
- IV. *Acceptance of a bill.*
- V. *Notice of non-acceptance and non-payment.*
- VI. *Liability of the parties.*
- VII. *Action on a bill or note.*

BILLS OF EXCHANGE AND PROMISSORY NOTES I.

Form, requisites, and effect of a bill or note.

1. A bill, or note, is *prima facie* evidence, under a count for money had and received, against the drawer or endorser. *Page's Administrator v. Bank of Alexandria, 7 Wheat. 35.*

2. But the presumption, that the contents of the bill or note have been received by the party sued, and for the use of the plaintiff, may be rebutted by circumstances; and a recovery cannot be had, in such a case, where it is proved the money was actually received by another party. *Id. 35.*

3. Bills of exchange drawn in one state of the union, on persons living in another state, partake of the character of foreign bills, and ought to be so treated in the courts of the United States. *Buckner v. Finley, 2 Peters, 587.*

4. The evidence in the case was that on the day when the note became due, the note was in the bank, the bank being the holder thereof, and it being payable there, and that after the usual banking hours were over, it was delivered to a notary by the officers of the bank for protest, they informing him at the time, that there were no funds there for the payment of the note. This was a sufficient proof of due demand of payment. *Bank of the United States v. Carneal, 2 Peters, 543.*

5. When a note is payable at a bank, it is not necessary to make any personal demand upon the maker elsewhere. It is his duty to be at the bank within the usual hours of business to pay the same, and if he omits so to do, and a demand is there made of payment by the holder within those hours, and it is refused or neglected to be made, the holder is entitled to maintain his action for such dishonour. *Id.*

6. Debt lies in favour of a holder of a dishonoured bank note, against a stockholder in the bank, to recover the amount of the note under the provisions of the bank charter making the stockholders personally liable for such note in such a case. *Bullard v. Bell, 1 Mason, 243.*

7. A bank note payable to W. Pitt or bearer, is in effect payable to the bearer; as between any *bona fide* holder, and the bank, such holder is to be deemed the bearer, to whom the bank is originally liable. *Id.*

8. Where the endorsed notes of A became due, and were taken up at the banks, and new notes signed by A and B his partner, and endorsed, were received by the banks in their stead: it was held that by such substitution the old notes were extinguished. *Russell v. Perkins, 1 Mason, 368.*

9. In a note given for the payment of a sum of money in *specific articles*, at "factory prices," the terms "factory prices" are to be construed the prices at which such goods are sold at factories, unless there be proof of a different technical sense universally established by the custom of trade. *Whipple v. Levitt, 2 Mason, 89.*

10. A bill of exchange, payable at 60 days after *sight*, was drawn in *Havana* upon *London*. *Held*, that it need not be sent from *Cuba* direct to *London*; but might be sent indirectly in any manner justified by the course of trade; and be sent for sale to the *United States*.

No absolute rule can be laid down, as to the time within which such a bill must be presented for acceptance. The only rule is, that it must be presented within a reasonable time: and what is a reasonable time, depends upon the circumstances of each particular case. *Wallace v. Agry*, 4 *Mason*, 336.

11. Taking of a bill of exchange is, at most, only *prima facie* evidence of a satisfaction and extinguishment of an antecedent debt. *Quere*, How far even this is to be relied on, as a general presumption in foreign states? A copy of the protest for non-acceptance need not accompany the notice of dishonour. It is sufficient to produce it at the time. *Id.*

12. Treasury notes are on their face payable in one year with interest up to the day when due, but if not then paid by the government, the interest does not stop; but continues until paid, and may be required by the holder in the same manner as interest might be claimed on a private contract of a like nature. *Thorndike v. United States*, 2 *Mason*, 1.

13. A bank holding the bank bills of another bank, and demanding payment of the same at the banking house of the latter, is not bound to receive its own bills in payment, but may demand specie. *A fortiori*, it is not bound to receive other bank bills or a *draft* in payment. *Suffolk Bank v. Lincoln Bank*, 3 *Mason*, 1.

14. A bank is bound to keep its money counted, or weighed, or to employ servants sufficient to count it, or weigh it, so as to pay all demands made within the usual bank hours. *Id.*

15. The holder of bank bills is not obliged to take foreign gold or coin at the bank count, but the payment must be by weight. *Id.*

16. The holder of bank bills is entitled to be paid in specie the amount of the bills, upon a demand within the usual banking hours of the bank. *Id.*

17. The holder of a bill is entitled to recover at the rate of exchange, at the time of notice of the protest's being given. This is the settled law in New York. *Jacob Barker v. United States*, 1 *Paine*, 156.

18. As the plaintiff in an action on a bill has a right to recover gold or silver, the measure of damages must be the value of the bill, at the time of notice of protest, in gold or silver, and not in a depreciated or fluctuating currency. *Id.*

19. The owner of a vessel sent her from New-York, consigned to his correspondent at Antwerp, with directions that they should dispatch her to India, furnishing the master with a letter of credit entitling him to draw on London for 5,000 pounds. The master was instructed if he should not have funds to purchase a cargo in India, to "extend his drawing." Being in want of funds he drew, not on the house in London on whom he had drawn the 5,000 pounds, but on the consignees at Antwerp, who had obtained the letter of credit, and to whom the vessel and cargo were to return. *Held* that the bills were drawn without authority, and should have been drawn on the house in London. *Executors of Clement v. Dickey*, 1 *Paine*, 377.

20. A bill of exchange is not, in general, to be considered as a satisfaction of a pre-existing debt, unless it be paid or accepted as such; nor if remitted conditionally, unless the debtor sustain injury by the laches of the creditor who received it. *Gallagher's Executors v. Roberts et al.* 2 *Wash. C. C. R.* 191.

21. If a bank note is divided, and one half of it lost, the *bona fide* holder of the half which is produced, is entitled to payment of its amount, on proving the loss of the other part, or accounting for the mutilated appearance of that which is produced. *Bullet v. The Bank of Pennsylvania*, 2 *Wash. C. C. R.* 172.

22. The payor of an instrument which passes by delivery, and which is alleged to be lost, may require the claimant to account for its loss; or if it be mutilated, to account for the same, and to prove that he came fairly into possession of it. *Id.*

23. The holder of the part which was lost or stolen, and which may afterwards be found, takes it from the finder or the robber, subject to every defence which could have been legally made against the finder or robber. *Id.*

BILLS OF EXCHANGE AND PROMISSORY NOTES II.*Transfer and endorsement.*

24. The negotiability of a promissory note, payable to order, is not restrained by the circumstances of its being given for the purchase of real property in Louisiana, and the notary, before whom the contract of sale is executed, writing upon it the words "*ne varietur*," according to the laws and usages of that state, and other countries governed by the civil law. *Fleckner v. U. S. Bank*, 8 *Wheat.* 363.

25. A promise by an endorser to pay a note, after being discharged, by neglect of due notice, is not binding unless made with a knowledge of all the material facts. *Martin v. Winslow*, 2 *Mason*, 241.

26. In a suit by an endorsee against an endorser of a note payable *on demand*, the plaintiff must show that the demand was made within a reasonable time on the maker for payment, otherwise the endorser is discharged. A delay for seven months to demand payment, unaccompanied by any circumstances accounting for such delay, is an unreasonable delay. *Id.*

27. The defendant being indebted to the plaintiff in London, for goods, remitted a bill of exchange drawn upon London, in his favour, which he endorsed "pay the amount to order for my use." The bill was not accepted nor paid; and was returned to the plaintiff's agent, who demanded payment of the defendant as endorser. Held that such special endorsement releases the endorser from the payment of damages, and prevents the negotiability of the bill. The amount of the bill is to be received by the endorsee for the use of the endorser. *Brown v. Jackson*, 1 *Wash. C. C. R.* 512.

28. If the endorsee be not a creditor of the endorser, then he is to receive the money, and remit it; or if the bill is dishonoured, he is to return it. *Id.*

29. In this case the plaintiff having received the bill in payment of a debt due to him, was entitled to look to every person responsible on the bill, in like manner as if he had bought the bill, with exception of a claim for damages on the endorser. *Id.*

30. If a bill of exchange is remitted with a special endorsement, in payment of a previous debt which it was meant to discharge, the special endorsement does not restrain the rights of the endorsee on the drawer or on any previous endorser; whatever may be the effect of such endorsement between the creditor and his endorser. *Brown v. Jackson*, 2 *Wash. C. C. R.* 24.

BILLS OF EXCHANGE AND PROMISSORY NOTES III.*Consideration.*

31. If a person undertake to accept a bill, in consideration that another will purchase a bill already drawn, or to be thereafter drawn, and as an inducement to the purchaser to accept it, and the bill is drawn and purchased upon the credit of such promise, for a sufficient consideration, such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. *Townesley v. Sunrall*, 2 *Peters*, 170.

32. If A says to B, pay so much money to C, and I will repay it to you, it is an original independent promise; and if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the contract. *Id.*

33. Damage to the promisee constitutes as good a consideration as benefit to the promisor. *Id.*

34. It can make no difference in law, whether the debt for which the bill of exchange is taken is a pre-existing debt, or money then paid for the bill. In each case there is a substantial credit given by the party to the drawer, upon the bill, and the party parts with his present rights at the instance of the promisee; whose promise is substantially a new and independent one, and not a mere guaranty of the existing promise to the drawer. Under such circumstances there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards. In each case the object of the promise is to induce the party to take the bill upon the credit of the promise: and if he does so take it, it binds the promisor. *Id.*

35. If the drawee have no funds in his hands, and the fact is known to the other party, and yet the inducement to take the bill is the promise of the drawee to accept it, it constitutes a valid contract between the parties, if there is a purchase of the bill upon the credit of such promise. The acceptance of the drawee of a bill binds him, although it is known to the holder that he has no funds in his hands. It is sufficient that the holder trusts to such acceptance. *Id.*

36. Bills drawn for an illegal consideration, or for one which happens to fail, cannot be enforced by one having notice of their character. *Perry et al. v. Crammond et al.* 1 Wash. C. C. R. 100.

37. Though a bill drawn for value received, might, *prima facie*, be considered as drawn upon a consideration, yet, when a strong ground is laid to show a want of consideration, the defendant ought to show that value was given for the bill. *United States v. Price*, 2 Wash. C. C. R. 460.

BILLS OF EXCHANGE AND PROMISSORY NOTES IV.

Acceptance of a Bill.

38. A stranger to the drawer and endorser of a non-accepted bill of exchange, may intervene *supra* protest, to pay the same for the honour of an endorser or drawer. *Konig v. Bayard et al.* 1 Peters, 262.

39. It is no objection to this intervention that it has been done at the request and under the guaranty of the drawees of the bill; who had refused to accept or pay the same. The arrangements made by the payor of the dishonoured bill, with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill for whose honour it has been paid. *Id.* 262.

40. If A, at the request of the drawee of a bill of exchange, and under his guaranty, accept and pay the bill *supra* protest, for the honour of the endorser, the party against whom suit is brought for the amount paid may avail himself of every defence which he could have had, if the bill had been paid *supra* protest for the honour of the endorser, by the drawee, and suit brought for the same. *Id.* 262.

41. The principle established in the case of *Coolidge v. Payson*, 2 Wheat. 75, confirmed. *Schimmelpennick et al. v. Bayard et al.* 1 Peters, 283.

42. If the drawees of a bill of exchange, who refuse to honour the bill, thus denying the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act. They can acquire no right, as the holders of the bill, paid *supra* protest, if they were bound to honour it in the character of drawees. *Id.* 285.

43. A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignees of the property and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill, generally, to the account of the shipper: held that the drawees were not bound to accept or pay the bill, in consequence of the proceeds of the shipments being received by them. *Id.* 286.

44. A merchant has a right, by the usage of trade, to draw on effects placed in the hands of the drawee, by shipment: and the consignee must pay the bills, if the shipment places funds in his hands. *Id.* 288.

30 **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

45. Bills of exchange, payable at a given time after date, need not be presented for acceptance at all; and payment may at once be demanded at their maturity. *Tounsley v. Sumrall*, 2 *Peters*, 170.

46. A promise to accept a *non-existing* bill, if shown to a third person, who upon the faith of such promise, receives the draft for a valuable consideration, is in law an acceptance. *Payson v. Coolidge*, 2 *Gallis*. 228.

47. And it is immaterial whether the consideration be a *pre-existing* debt, or money advanced at the time. *Id.*

48. A bill drawn payable at five days *after sight*, and accepted on the *first* day of the month, is payable on the *ninth* of the same month, the day of the acceptance being excluded, and the three days of grace allowed; a demand on the eighth, and protest for non-payment on that day, is too early, and therefore void. *Mitchell v. Degrand*, 1 *Mason*, 176.

49. A bill payable at five days after sight, is presented for acceptance on the 30th of September, but not in fact accepted until the 1st of October, the acceptance takes effect only from that day, and does not relate back to the time of presentment on the preceding day. *Id.*

50. A bill payable so many days after sight, means so many days after legal sight, that is, so many days after the acceptance, for that is the sight to which the bill refers. *Id.*

51. Time of presentment for acceptance between New-York and Liverpool. The mere lapse of three months before presentment not evidence of delay, especially during war. *Jacob Barker v. United States*, 1 *Paine*, 156.

52. The defendants accepted a bill of exchange, for the honour of the first endorser, the bill being under protest, agreed to pay any person authorized to receive the money, and to give a discharge; this acceptance did not bind the defendants to pay, without the holder putting his name on the bill, or giving, as required, an indemnity to the defendants. *Freeman v. Perrot*, 2 *Wash. C. C. R.* 485.

BILLS OF EXCHANGE AND PROMISSORY NOTES V.

Notice of non-acceptance and non-payment.

53. Where the second day of grace falls on Saturday, it is the last day of grace; and notice of non-payment given to the drawer of a bill on that day, after a demand upon the acceptor on the same day, is sufficient to charge the drawer. *Bussard v. Levering*, 6 *Wheat.* 102.

54. Notice to the drawer, by putting the same in the post-office, where the persons live in different places, is good. *Id.*

55. After demand of the maker of a note, on the third day of grace, notice to the endorser on the same day, is sufficient by the general law-merchant. *Lindenberger v. Beall*, 6 *Wheat.* 104.

56. Evidence of a letter, containing notice, having been put into the post-office, directed to the endorser, at his place of residence, is sufficient proof of the notice to be left to the jury, and it is unnecessary to give notice to the defendant to produce the letter before such evidence can be admitted. *Id.*

57. No protest of a promissory note, or inland bill of exchange, is necessary. *Young v. Bryan*, 6 *Wheat.* 146.

58. A protest of an inland bill or promissory note is not necessary, nor is it evidence of the facts stated in it. *The Union Bank v. Hyde*, 6 *Wheat.* 572.

59. The following undertaking of the endorser of a promissory note, "I do request that hereafter any notes that may fall due in the Union Bank, in which I am or may be endorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested," held to be ambiguous as to whether it amounted to a waiver of demand and notice; and parol proof admitted to show that it was the understanding of the parties, that the

demand and notice required by law to charge the endorser, should be dispensed with. *Id.*

60. Where the maker of the note has removed into another state, or another jurisdiction, subsequent to the making of the note, a personal demand upon him is not necessary, to charge the endorser, but it is sufficient to present the note at the former place of residence of the maker. *M'Gruder v. Bank of Washington*, 9 *Wheat.* 598.

61. No precise form of notice to the endorser, of a promissory note, is necessary; and it is not necessary to state in the notice, who is the holder; nor will a mistake as to the date of the note vitiate the notice, if it conveys to the party a sufficient knowledge of the particular note which has been dishonoured. *Mills v. Bank of the U. States*, 11 *Wheat.* 431.

62. It is not necessary that the notice should contain a formal allegation, that it was demanded at the place where payable. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the endorser for indemnity. *Id.* 437.

62. By the general law, demand of payment of a bill or note must be made on the *third* day of grace; but where a note is made for the purpose of being negotiated at a bank, whose custom is to demand payment, and give notice on the *fourth* day, that custom forms a part of the law of the contract; and it is not necessary that a personal knowledge of the usage should be brought home to the endorser for that purpose. *Id.* 438.

64. An unconditional promise, by the endorser of a bill or note, to pay it, or the acknowledgment of his liability, after knowledge of his discharge from his responsibility by the laches of the holder, is an implied waiver of due notice of a demand from the drawee, acceptor or maker. *Thornton v. Wynn*, 12 *Wheat.* 183. 187.

65. A mere agreement by the holder of a bill with the drawer for delay, without any consideration for it, and without any communication with, or assent of the endorser, will not discharge the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself. *M'Levors v. Powell*, 12 *Wheat.* 554. 556.

66. Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the endorser, as in a transaction between private individuals. *United States v. Barker*, 12 *Wheat.* 559.

67. Where the United States were the holders of certain bills of exchange, and their agent in New-York was directed, by a letter from the Secretary of the Treasury, dated Washington, December 7th, 1814, to give notice of non-acceptance to the drawer and endorsers, residing in New-York, and notice was given to the endorser on the 12th of the same month, the mail which left the 8th having arrived at New-York at 35 minutes past 10 o'clock, A. M. on the 10th. *Held*, that the endorser was discharged by the negligence of the holders. *Id.*

68. So, also, where the United States were the holders of other bills, and their agent in New-York, was directed, by a letter from the Secretary of the Treasury, dated Washington, May 8th, 1815, to give notice of non-payment to the drawer and endorsers residing in New-York, and notice was given to the endorser on the 12th of the same month; the mail which left Washington on the 8th having reached New-York early on the morning of the 11th; *held*, that the endorser was discharged by the negligence of the holders. *Id.*

69. The deposit of a bill in one bank, to be transmitted to another, for collection, is a common usage, of great public convenience; and the duty of a bank, receiving such a bill for collection, is precisely the same, whoever may be the owner thereof; and if it was unwilling to undertake the collection without precise information on the subject, the duty ought to have been declined. *The Bank of Washington v. Triplett and Neale*, 1 *Peters*, 30.

70. By failing to demand payment of a bill held for collection, the bank would make the bill its own, and would become liable to its real owner for the amount. *Id.* 31.

71. The omission of a bank holding a bill payable after date for collection, to give notice to the drawer, that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharges the drawer from his liability. *Id.* 35.

72. A bill of exchange, payable after date, need not be presented for acceptance before the day of payment; but, if presented, and acceptance be refused, it is dishonoured, and notice must be given. The absence from his home, of the drawee of a bill, payable after date, when the holder of a bill, or his agent, call with it for acceptance, is not a refusal to accept; but such absence, when the bill is due, is a refusal to pay, and authorizes a protest. *Id.* 35.

73. In a suit instituted by the holder of a bill, against the bank, for negligence, in relation to demand, or notice of non-payment of the bill, the Court, although required, are not bound to declare the law as between the holder and the drawer. The bank was the agent of the holder, and not of the drawer, and might consequently, so act, as to discharge the drawer, without becoming liable to its principal. *Id.* 36.

74. In an action against the endorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank. No other notice of the non-payment of the note was sent to the endorser, but that left for him at the Bank of the Metropolis; and it was proved that there was an agreement by parol, with the endorser, as to other notes discounted previously, by the bank, for his accommodation, that payment and demand of payment, should be made at the bank; the endorser residing a considerable distance from the bank. Held to be sufficient. *Bunt's Executors v. The Bank of the Metropolis*, 1 Peters, 89.

75. The endorser of such a note is himself bound by the contract made by the drawer, and by the established and known usage of the bank. *Id.* 93.

76. A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town: the defendant, the endorser of the note, living in the county of Alexandria, within the District of Columbia, and having what was alleged to be a place of business in the city of Washington; and that the notice of non-payment of the note, enclosed in a letter and superscribed with his name, was put into the post-office at Georgetown, addressed to him at that place. Held that this notice was sufficient. *The Bank of Columbia v. Lawrence*, 1 Peters, 582.

77. In cases where the party entitled to notice resides in the country, unless notice sent by the mail is sufficient, a special messenger must be employed for the purpose of sending it; but this case is not one which required such a duty. *Id.* 582.

78. The general rule is, that the party whose duty it is to give notice of the dishonour of a bill or note, is bound to due diligence in communicating the same. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or not, the holder has done all the law requires of him. *Id.* 582.

79. It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence, is a question of law. *Id.* 583.

80. The rules relative to diligence ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description. *Id.* 583.

81. When the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice; and in such cases, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice. *Id.* 583.

82. Some countenance has lately been given in England to the practice of sending a notice by a special messenger in extraordinary cases, by allowing the holder to recover of the endorser the expenses of serving the notice in this manner. The holder is not bound to use the mail for the purpose of sending the notice. He may employ a special messenger if he pleases, but it has not been decided that he must. To compel the holder to the expense of a special messenger would be unreasonable. *Id.* 584.

83. The notary public, after the protest of the note, called at the house of the endorser, who lived in the city of Cincinnati, which he found shut up and the door locked; and on inquiry of the nearest resident, he was informed that the endorser and family had left town on a visit, whether for one day, or week, or month, he did not know, nor did he inquire. He made use of no further diligence to ascertain where the endorser had gone, or whether he had left any person in town to attend to his business. He left a notice at the house of a person adjoining, with a request to hand it to the endorser, when he should return. Held, that this was sufficient diligence to charge the endorser. *Williams v. Bank of the United States*, 2 Peters, 96.

84. The holder of a bill or promissory note, in order to entitle himself to call upon the drawer or endorser, must give notice of its dishonour to the party whom he means to charge. But if, when the notice should be given, the party entitled to it should be absent from the state, and has left no known agent to receive it; if he abscond, or has no place of residence which reasonable diligence used by the holder can enable him to discover, the law dispenses with the necessity of giving regular notice. *Id.*

85. C. the endorser of a promissory note, at the time it fell due, lived in a house in Georgetown, except the lower front room, which was occupied separately, as a store, by one of his sons. There was a separate entrance to the dwelling part of the house occupied by the endorser, through an alley or passage, apart from the store, which led to the upper rooms and back buildings and yard of the house. The son of C. who occupied the store, had a dwelling-house apart from the store. C. was at that time postmaster of Georgetown, and kept the post-office in another part of the town, where he commonly transacted his *private business* as well as that of his office. He had no concern in his son's store, but was frequently about the door. Until he took charge of the post-office, which was a year before the note fell due, written communications and notices to him were sometimes left at the store, and were carried by another of his sons, unless when he forgot it, to him. After C. took possession of the post-office, if notices had been left at the store for him, the bearer of them would have been directed to take them to the post-office, or they would have been carried there and delivered to him by his son, if recollected, or if they had been seen when left at the store. The notary stated that he believed the notice of non-payment of the note was left at the store, because he thought that he had frequently notices to give to the defendant, and was in the habit of leaving them at the store, and he never had been in the dwelling-house, or in the passage or alley. Held, that this notice was not sufficient to charge the endorser. *Bank of the United States v. Corcoran*, 2 Peters, 121.

86. If notice of non-payment, although left at an improper place, was nevertheless, in point of fact, received in due time by the endorser, and so proved, or could from the evidence in the cause be properly presumed by the jury; it is sufficient in point of law to charge the endorser. *Id.*

87. When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it is a post town; if it is not, then to the post-office or post town nearest to his residence, if known. But the rule, as to the nearest post-office, is not of universal application; for if the party is in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and the fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices, to suit his own convenience or business, it may be sufficient to send it to either. *Bank of the United States v. Carneal*, 2 Peters, 542.

88. When upon a bill payable at so many days *after sight* the holder presents the bill for acceptance, and elects to consider what passes on such presentment, as a non-acceptance, he is bound by such election as to all the other parties in the bill, and must give due notice to them of the dishonour accordingly; otherwise they will be discharged. And a subsequent acceptance by the drawee on the next day

will not be sufficient to charge the drawer, in case no such notice is given, and the drawee fails before the day of payment. *Mitchell v. Degrand*, 1 *Mason*, 176.

89. If an endorser is once fixed by due notice of the non-acceptance of a bill, no delay of the holder to return the bill and demand payment takes away his right of recovery, notwithstanding the drawer may, in the intermediate time, have failed. *Wild v. Bank of Passamaquoddy*, 3 *Mason*, 505.

90. A drawer, having no funds in the hands of the acceptor, or having withdrawn them without giving notice of the bill, and intercepting all other funds before they reach the acceptor, is not entitled to strict notice of non-payment. He has no right to expect the bill to be paid. *Valk v. Simmons*, 4 *Mason*, 113.

91. The bill was drawn by the defendant at New-Orleans, on Philadelphia, in favour of the plaintiff, and was by him endorsed, in full, to a third person, and had been regularly protested for non-acceptance and non-payment; but no notice of the dishonour of the bill was proved to have been given to the drawer. The endorsement being in full cannot be struck out at the time of trial. The want of notice prevents a recovery by the plaintiff. *Craig v. Brown*, 1 *Peters' C. C. R.* 171.

92. Where the drawer of a bill of exchange has no funds in the hands of the drawee, neither protest nor notice of non-acceptance or non-payment to the drawer, is necessary to enable the payee to recover. *Baker v. Gallagher*, 1 *Wash. C. C. R.* 461.

93. Generally, notice to the endorser ought to be given, although he should be beyond sea, if the place of his residence is known. *M'Murtrie v. Jones*, 3 *Wash. C. C. R.* 206.

BILLS OF EXCHANGE VI.

Liability of the parties.

94. Where a bill of exchange is drawn by the master of a ship, by authority of the owners, in his own name, for cargo supplied by the owners, the latter are liable, and are entitled to the same defence against the bill, in case of dishonour, that they would be as drawers. *Wallace v. Agry*, 4 *Mason*, 336.

95. When an accommodation bill goes into the hands of a *bona fide* holder, even with notice of its particular character, he is entitled to recover the amount thereof from the drawer. *Perry et al. v. Crammond et al.* 1 *Wash. C. C. R.* 100.

96. Bills, delivered after the death of the drawee, to a person who had made advances upon their faith, to the drawee, who had them in his possession, for the purpose of raising money for the drawer, may be enforced against the representatives of the drawer. *Id.*

97. If a bill of exchange, or a promissory note, is given and received in satisfaction of a precedent debt, the laches of the holder, by which the amount due upon the bill is lost, will prevent a claim upon the person from whom it was received in payment. *Roberts v. Gallagher*, 1 *Wash. C. C. R.* 156.

98. If A loan the note of a third person to B, B must use due diligence to recover the amount due by it; and if the debt is lost by the insolvency of the maker, and by B's want of diligence, B must pay the amount of the note to A. *Higbie v. Hopkins*, 1 *Wash. C. C. R.* 230.

99. If a bill of exchange be drawn by A, with directions to charge the amount thereof to B, and it is accepted generally, and paid, the drawer is not liable to the drawee; unless it appear that B was the agent of A, and the direction to charge the bill to him, was only to point out the fund from which the bill was to be paid. *Bell v. Davidson*, 3 *Wash. C. C. R.* 329.

BILLS OF EXCHANGE AND PROMISSORY NOTES VII.

Action on a bill or note.

100. In a declaration upon a promissory note, the omission of the place where it is payable is fatal. *Sebree v. Dorr*, 9 *Wheat.* 558. 561, 562.

101. By the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the *fourth* day after the time limited for the payment thereof, in order to charge the endorser, contrary to the general law-merchant, which requires a demand on the third day. *Renner v. Bank of Columbia*, 9 *Wheat*. 581. 584.

102. Evidence of such a local custom is admissible, in order to ascertain the understanding of the parties, with respect to their contracts made with reference to it. *Id.* 587.

103. Cases in which evidence of commercial usage is admissible, in order to ascertain the meaning of contracts. *Id.* 588.

104. The declaration against the endorser, in such a case, must lay the demand on the *fourth*, and not on the *third* day. *Id.* 594.

105. *Quære*, Whether a declaration, in such a case, not averring the local usage, would be good upon demurrer? *Id.* 594.

106. Secondary evidence of the contents of a lost note is admissible, wherever it appears that the original is destroyed, or *lost* by accident, without any fault of the party. *Id.* 596.

107. In the case of a lost note, it is not necessary that its contents should be proved by a *notarial* copy. All that is required is, that it should be the best evidence the party has it in his power to produce. *Id.* 597.

108. To admit secondary evidence of a lost note, it is not necessary that there should be a special count in the declaration upon a lost note. *Id.* 597.

109. *It seems*, that as against the *maker* of a promissory note, or against the *acceptor* of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary. *U. States Bank v. Smith*, 11 *Wheat*. 171. 174.

110. But as against the endorser of a bill or note, such an averment and proof is, in general, necessary. *Id.*

111. Where the bill or note is made payable at a particular bank, and the bank itself is the holder, such averment and proof may be dispensed with: and all that is necessary is, for the bank to examine the account of the maker with them, in order to ascertain whether he has any funds in their hands. *Id.* 176.

112. The general rule of law, requiring proof of the title of the holders of a note, may be modified by a rule of Court, dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him. *Mills v. Bank of the United States*, 11 *Wheat*. 439.

113. A bill of exchange, expressed to be collateral to a ransom bill, is a contract upon which an action may be sustained at common law; the plaintiff and payee being an alien friend. *Maisonnaire v. Keating*, 2 *Gallis*. 325.

114. In an action upon such bill of exchange, the capture must be taken to be justifiable, and the ransom regular. *Id.*

115. If a draft, not negotiable, be accepted by the drawee with an agreement to pay the amount to any person to whom it is assigned; the assignee after notice may maintain an action for money had and received to his use against the acceptor. *Weston v. Penniman*, 1 *Mason*, 306.

116. An action for money had and received, will not lie, by the acceptor of a bill of exchange, who has not paid the same. But the acceptor of a bill of exchange who at the time of his acceptance had no funds belonging to the drawer, although he has not paid the bill, may sue the drawer if he has done something equivalent to payment; as if he is in confinement under a *capias ad satisfaciendum*, founded on his acceptance. Imprisonment, under a *capias ad satisfaciendum*, is a satisfaction of the debt as to the defendant. *Parker et al. v. United States*, 1 *Peters' C. C. R.* 262.

117. In an action on the case to recover the amount of an accepted bill of exchange, from the acceptor, the plaintiffs, who were payees and endorsers of the bill, cannot recover the damages and costs of suit which had been recovered against them by the endorsee of the bill, there being no money count in the declaration. *King & Jones v. Phillips*, 1 *Peters' C. C. R.* 350.

118. Where the declaration contains due averments of the presentment of a bill for acceptance, and due dishonour and notice to the drawer, proof of these averments is sufficient, although there are subsequent averments in the declaration of presentment for payment, non-payment, and notice thereof, which averments are not proved. The right of action is complete by the non-acceptance, protest, and notice. *Wallace v. Agry*, 4 *Mason*, 336.

119. Where the endorser of a bill of exchange, whether as agent or owner, returns it after protest to the last endorser, the latter may sue upon it in his own name, and at the trial strike out the last endorsement although it be in full. And prior blank endorsements may be filled up at the trial so as to correspond with the declaration. And where both these were omitted to be done, the Court on error refused to reverse the judgment, considering it an objection of form, and cured by the 32d section of the judiciary act. *Jacob Barker v. United States*, 1 *Paine*, 156.

120. *Quære*, Whether 20 per cent. damages can be recovered in an action for the non-acceptance, but not the non-payment of a bill? *Id.*

121. But where the action was commenced on the non-acceptance of the bill, and after its non-payment, but before notice of non-payment had been received, and a count on the protest for non-payment was inserted in the declaration, the 20 per cent. damages were held recoverable. *Id.*

122. A bill of exchange endorsed to the Treasurer of the United States, may be declared on in the name of the United States, and an averment that it was endorsed immediately to them will be good. *Id.*

123. A, having funds in the hands of B, drew a bill of exchange in favour of C, who endorsed it to D and E, to whom he was indebted, and the bill being protested for non-acceptance, D and E brought a suit against B, the *drawee*, in the name of C, the *endorser*; and before judgment an attachment was laid upon the funds in hands of B, as *the property of C*, and judgment obtained against B, as the garnishee. Held, that the attachment will not affect the right of D and E, to recover the amount of the bill from the drawer; the right to the funds in the hands of the drawee being completely vested in D and E, by the endorsement of the bill. *Corser v. Craig*, 1 *Wash. C. C. R.* 424.

124. The drawer of a bill of exchange protested after acceptance, having paid the damages, cannot set off the same, in an action against him by the acceptor, on another account, although the acceptor had funds in his hands to pay the bill, the damages being unliquidated. *Armstrong v. Brown*, 1 *Wash. C. C. R.* 34.

125. The payee must either state the bill was protested, or show that it was not incumbent on him to protest it, because the drawer had no funds in hands to pay the bill; but this omission can only be taken advantage of by special demurrer. *Baker v. Gallagher*, 1 *Wash. C. C. R.* 461.

126. Where the drawer had no funds in the hands of the drawee, an action may be brought by the holder, upon the bill, before the time it would be payable, if it had been accepted. It may be brought immediately on non-acceptance. *Id.*

127. In an action by the endorser of a bill of exchange, against the drawer, it is sufficient to account for the non-production of the bill, that it was lodged with the Commissioners of Bankruptcy, under a commission issued against the drawer, and still remains with the drawer. *Palmer v. Blight*, 2 *Wash. C. C. R.* 96.

128. In an action upon a promissory note, where the plea is *non assumpsit*, the defendant cannot give evidence of damages sustained by a breach of the contract upon which the note was given. *Cheongwo v. Jones*, 3 *Wash. C. C. R.* 359.

BOND.

1. The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms. *Miller v. Stewart*, 9 *Wheat.* 680.

2. Where a bond was given, conditioned for the faithful performance of the duties of the office of Deputy Collector of direct taxes for eight certain townships, and the instrument of the appointment referred to in the bond, was afterwards altered so as to extend to another township, without the consent of the sureties; *Held*, that the surety was discharged from his responsibility for moneys subsequently collected by his principal. *Id.* 704.

3. A bond given on the 4th of December, 1813, for the faithful discharge of the duties of his office, by a collector of direct taxes and internal duties, appointed (under the act of the 22d of July, 1813, c. 16,) by the President, on the 11th of November, 1813, to hold his office until the end of the next session of the senate and no longer, and subsequently appointed by the President, with the advice and consent of the senate, on the 24th of January, 1814, is to be restricted (as to the liability of the sureties) to the duties and obligations created by the collection acts passed antecedent to the date of the bond. *United States v. Kirkpatrick*, 9 *Wheat.* 720. 730.

4. The second commission, issued under the appointment, with the advice and consent of the Senate, operates a revocation of the first commission, issued under the appointment by the President, which was to continue until the end of the next session of the Senate, and no longer; and the liability of the sureties in the bond did not extend beyond the duration of the first commission. *Id.* 734.

5. In general, laches is not imputable to the government; and where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties. *Id.* 735.

6. An omission of the proper officer to recall a delinquent paymaster under the injunctions of the 4th section of the act of the 24th of April, 1816, c. 69, does not discharge his surety. *The United States v. Van Zandt*, 11 *Wheat.* 184. 188. *Dox v. The Postmaster General*, 1 *Peters*, 325.

7. The provisions in the above act requiring the delinquent paymaster to be recalled, and a new appointment to be made in his place, are merely directory, and intended for the security of the government; but form no part of the contract with the surety. *The United States v. Van Zandt*, 11 *Wheat.* 189.

8. The statute not removing the delinquent postmaster, *ipso facto*, but only making it the duty of the proper officer to remove him, the circumstance of new funds being placed in his hands, after his delinquency, does not discharge the surety. *Id.* 189.

9. The act of May 15th, 1820, ch. 625, s. 2, which requires new sureties to be given by certain public officers on or before the 30th of September, 1820, does not expressly, or by implication, discharge the former sureties from their liability. *The U. S. v. Nicholl*, 12 *Wheat.* 505. 508.

10. The sureties are not responsible for moneys placed by the government in the hands of the principal, after the legal termination of his office; but they are responsible for moneys which came into his hands while in office, and which he subsequently failed to account for and pay over. *Id.* 509.

11. In general, laches is not imputable to the government: But, *quære*, whether, in case there is an express agreement between the government and the principal, giving time to the latter, and suspending the right of the former to sue, the sureties are not discharged, as in a similar case between private individuals? *Id.* 510.

12. A mere proposition to give time, and suspend the right to sue, upon certain conditions and contingences, which are not proved to have been complied with, or to have happened, will not discharge the sureties. *Id.* 510.

13. A. W. M'G. gave a bond to the Bank of the United States, with sureties conditioned for the faithful performance of the duties of the office of cashier of one of the offices of discount and deposit during the term he should hold that office. The President and Directors of the Bank having discovered that he had been guilty of a gross breach of trust, passed a resolution at Philadelphia, on the 27th of October, 1820, "that A. W. M'G. cashier, &c. be, and he is hereby suspended from office, till the further pleasure of the board to be known;" and another resolution, "that the pres-

dent of the office at Middletown, be authorized and requested to receive into his care, from A. W. M'G. the cashier, the cash, bills discounted, books, papers, and other property in said office, and to take such measures for having the duties of cashier discharged, as he may deem expedient." These resolutions were immediately transmitted by mail to the President of the office at Middletown, who received them on the morning of Sunday, the 29th of the same month, but did not communicate them to the cashier, nor carry them into effect, until the afternoon of the 30th, between four and five o'clock: *Held*, that the sureties continued liable for his defaults until that time. *M'Gill v. Bank of the United States*, 12 *Wheat*. 511. S. C. 1 *Paine*, 661.

14. On such a bond the recovery against the sureties is limited to the penalty. *Id.* 511.

15. Partial payments having been made by the sureties, (subject to all questions,) the application of these payments was made by deducting them from the penalty of the bond, and allowing interest on the balance thus resulting, from the commencement of the suit, there having been no previous demand of the penalty, or acknowledgment that the whole was due. *Id.* 514.

16. But interest was refused to the sureties on the payments. *Id.* 515.

17. An agreement between the creditor and principal debtor for delay, or otherwise changing the nature or contract to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties. *M'Lemore v. Powell*, 12 *Wheat*. 554. 556.

18. The condition of a bond that the officer shall "well and truly execute the duties of his office," includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully; if they are violated from want of capacity or want of care, they can never be said to be "well and truly executed." *Minor v. Mechanics Bank of Alexandria*, 1 *Peters*, 69.

Acts of fraud, or known departure from duty by the Board of Directors of a bank, will not protect the cashier in his wrongful compliance, nor can a misapplication of the funds of the bank be justified by any vote of the directors, however formal; and therefore, whenever done by the cashier, it is at his peril, and on the responsibility of himself and his sureties. *Id.* 72.

19. The bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank; and sureties are presumed to enter into the contract, with reference to the rights and authorities of the President and Directors, under the charter and by-laws. *Id.* 73.

20. The discharge by the Secretary of the Treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against the sureties for the amount due upon the judgment, and unpaid. *United States v. Stansbury*, 1 *Peters*, 575.

21. It is no objection, in an action of debt against one of the obligors in a joint and several bond given for duties, that a co-obligor has been taken in execution on a judgment on the same bond, and discharged under the act, 6th June, 1798, ch. 66. *Hunt v. United States*, 1 *Gallis*. 32.

22. A instrument, which is void as a bond may yet be good as a stipulation. *The Alligator*, 1 *Gallis*. 149.

23. Judgment on a bond cannot exceed the penalty thereof and interest from the breach, although the sum actually be larger. *United States v. Arnold*, 1 *Gallis*. 348.

24. A bond given for the payment of duties, in the alternative required by the act, 1799, ch. 128, is discharged by the performance of either part of the condition at the election of the obligor, although the sum named in the condition be less than the duties. *United States v. Thompson et al.* 1 *Gallis*, 388.

25. A bond voluntarily given upon the delivery of property on bail, on application of the claimant, is good, although the condition does not exactly conform to the 89th sect. of the act, 1799, ch. 128. *The Struggle*, 1 *Gallis*. 476.

26. A bond taken pursuant to the act, 1799, ch. 128, sect. 89, is in the nature of a stipulation in the admiralty, and the judgment on it is not to be considered as a distinct judgment at common law, but as a mere incident to the original cause. *M^c Lellan v. United States*, 1 *Gallis*. 227.

27. A surety upon a bond is not discharged by a mere delay to demand payment after it becomes due, without fraud or express agreement for delay. *Hunt v. United States*, 1 *Gallis*. 32.

28. *Quere*, How far such a delay, by agreement, is a good bar in favour of a surety at law? *Id.*

29. *Quere*, If a party can, as to the obligee, aver himself a surety, unless his character appear on the face of the bond? *Id.*

30. In proceedings *in rem* upon a bond for the appraised value given jointly and separately, if one of the obligors dies, the Court will proceed against the survivor, or, at the option of the plaintiffs, against the representatives of the deceased also. *The Octavia*, 1 *Mason*, 149.

31. A bond taken at the custom house to secure the duties due by the importers of goods, is not an extinguishment of the debt so accruing, but merely collateral security for its payment. *United States v. Lyman*, 1 *Mason*, 482.

32. If an obligee tear off the seal, or cancel a bond in consequence of fraud and imposition practiced by the obligor; he may declare on such mutilated bond as the deed of the party, and set forth special facts in the profert. *United States v. Spalding*, 2 *Mason*, 478.

33. The neglect of the postmaster-general to sue for balances due by postmasters within the time prescribed by law, although he thereby is rendered personally chargeable with such balances, is not a discharge of the postmasters or their sureties upon their official bonds. Nor is an order from the post office department, directing a postmaster to retain the balances due *until drawn for* by the general post office. *Locke v. the Postmaster-general*, 3 *Mason*, 446.

34. In an action of debt on a bond, with a collateral condition, nothing can be recovered, but what the obligee is entitled to, upon a breach of the condition. *Massey v. Schott et al.* 1 *Peters*, C. C. R. 132.

35. A bond given by a collector of the internal revenue, with sureties, conditioned that the collector had accounted and would account, for all taxes collected or to be collected, is not binding on the sureties, as to collections previously made; and the Court granted a perpetual injunction against proceedings on such bond, except for the sums received by the collector after its execution. *Armstrong et al. v. United States*, 1 *Peters*, C. C. R. 47.

36. Where a bank, in which the bonds for customs were left for collection under the authority of the government, discounted for the principal obligor certain notes for the payment of these bonds, and the proceeds were carried to the credit of the *United States* by the Bank, in discharge of the bonds, and it turned out, that the endorsements on the notes were forgeries practised by the principal, it was held, that the bonds were discharged, and there was no remedy in equity to acquire a priority on the assets of the principal. *United States v. Rousmaniere's administrators et al.* 2 *Mason*, 373.

37. Proceedings by libel were instituted upon a seizure of goods, and a bond given for their appraised value on the delivery of the goods to the claimant. Afterwards the libel was by amendment changed to an information, and the goods were condemned. On an application for an attachment against the obligors in the bond, it was held that although the case was not regularly within the 89th section of the collection law, yet a compliance with the stipulations in the bond might be enforced by attachment against the obligors. *United States v. 4 part pieces of woollen Cloth*, 1 *Paine*, 435.

38. And the Court held that it made no difference that the obligors were only sureties, and had not themselves received the goods. *Id.*

39. If the claimant is not a party on the bond, all the obligors are to be deemed principals. *Id.*

40. The bond was taken in the District Court of New-York, and under the statute dividing the District the proceedings were transferred to the District Court of the Northern District, and by a subsequent statute to this Court, where the condemnation took place. The condition of the bond was to pay the appraised value of the goods into the District Court, if they should be condemned in that Court: held that a condemnation in this Court had the same effect to forfeit the bond. *Id.*

41. An alteration in the bond made by one of the clerks of the custom house, after its execution, for the purpose of rectifying it, but which did not affect its construction, was held to be the act of a stranger, and immaterial, and not to avoid the bond. *United States v. Hatch*, 1 *Paine* 336.

42. Sureties are exonerated from their responsibility by any agreement, without their consent, between the creditor and principal, which varies essentially the terms of the contract. *United States v. Tillotson*, 1 *Paine*, 305.

43. Such an agreement substituting tapia for brick, and altering the mode of estimation and price of labour in the construction of a fort, was held to discharge the sureties. *Id.*

44. And it is immaterial whether such alterations be for the benefit or to the prejudice of the principal. *Id.*

45. One made a contract with the War Department to build a fort, in which it was agreed that advances should be made, in part payment of the work, for materials delivered with the invoice at the fort, and pronounced by the engineer of proper quality, and at the end of each month for the work performed. Large advances having been made, the contract was assigned, and the assignee gave a bond with sureties to account for "advances under and by virtue of the contract." The sureties were held entitled to the benefit of all the limitations provided in the contract, and not answerable for advances made where such limitations were dispensed with, whether the advances were made before or after the making of the bond, the sureties not appearing to have known how such advances had been made. *Id.*

46. Advances made under such a contract are not a purchase of the materials delivered so as to vest the property in the United States, but it remains unchanged. *Id.*

47. Whether the death of the principal before the time for the completion of the work had expired put an end to the contract above described and discharged the sureties? *Quære. Id.*

48. But it seems that they were discharged by the refusal of the War Department to suffer the administrator of the principal to proceed to complete the work. *Id.*

49. *Quære*, Whether the appropriation by Congress of only 30,000 dollars to complete the fort, when 690,000 dollars were required, authorized the contractor to suspend the work before the appropriation was exhausted, and discharged the sureties? *Id.*

50. A discharge from imprisonment by the Secretary of the Treasury, of a debtor to the United States, under the act of 1798, does not discharge his co-obligors and sureties in the bond from their liability. *United States v. Sturges*, 1 *Paine*, 525.

51. Where a bond with a penalty is given for the performance of covenants, although damages may have been sustained to a greater amount, yet the recovery must be limited to the penalty, especially in a case of sureties. *Bank of U. S. v. M'Gill*, 1 *Paine*, 661.

52. It seems that this is not the rule where bonds are conditioned for the payment of money. *Id.*

53. The obligors on a bond for the jail limits are not discharged from their liability for an escape by the subsequent assent of the plaintiff. Such assent to have any effect must have been given prior to the escape. *Slocum v. Hathaway*, 1 *Paine*, 290.

54. The condition of a bond that a prisoner "shall faithfully and absolutely remain within the limits of the jail, and not depart therefrom," &c. is not broken by the escape of the prisoner, while in a state of insanity. *Hazard v. Hazard*, 1 *Paine*, 295.

55. The liability of the sureties for an escape is not co-extensive with that of the Sheriff. As it regards the latter, a prisoner on the limits is supposed to be in his immediate custody, and the escape of an insane prisoner, therefore, as much a negligent escape as any other; and he is not allowed to excuse himself where he might so easily collude or be imposed upon. But there is no analogy in these respects between a Sheriff and these sureties. *Id.*

56. Where a Battalion Quarter-Master gave a bond to the United States; conditioned "to expend faithfully all public moneys and to account for all public property," it was held that he was bound to account, not with the Quarter-Master General, but the Treasury Department, and that this obligation extended to public moneys as well as public property, and to moneys expended by him while acting as a deputy of the Quarter-Master General; and a claim for credit which had never been presented at the Treasury, was rejected. *United States v. Lent, 1 Paine, 417.*

57. Nothing beyond the penalty of a bond can be recovered, but if more can be given, the damages are in the discretion of the jury, who are not bound by the rule of the contract; and therefore may give less than the legal, or agreed interest. *Goldhawk v. Duane, 2 Wash. C. C. R. 323.*

58. If there has not been made a previous demand of the penalty of a bond, or an acknowledgment that the whole is due, interest is recoverable only from the commencement of the suit. *Bank of U. S. v. Magill, 1 Paine, 661.*

59. Where a bond had been taken by the collector, by which the obligor stipulated to reland a cargo, on board a particular vessel, in the United States; although the same might be prevented by the perils of the sea, and stipulating that a certificate of the landing of the cargo should, within a limited time, be delivered to the collector of the port of Philadelphia, to whom the bond had been given; the Court held the bond void, the embargo laws not authorizing the insertion of such stipulations. *United States v. Morgan et al. 3 Wash. C. C. R. 10.*

60. Construction of a bond given before marriage to trustees, in the nature of a marriage settlement; and of the will of the obligor, devising real estate to his wife, which was held to be an execution of the stipulations in the bond. *Bryant v. Hunters et al. 3 Wash. C. C. R. 48.*

61. If a creditor without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged, both at law and in equity, and this rule is applicable as well to bonds with collateral conditions, as to bonds for the payment of money; and whether the arrangement is intended for the benefit of the surety or not. *United States v. Administrators of Hillegas, 3 Wash. C. C. R. 70.*

62. Debt on a bond given under the embargo laws. The question on the evidence was, whether the defendants were prevented by *perils of the sea*, from performing the condition of the bond.

63. If the vessel was not seaworthy, the injury done to her or to her voyage by perils of the sea, will not excuse the defendants, who should clear themselves from all imputations of this kind; but the rule as to seaworthiness, ought not to be more strict in such cases as this, than in cases of insurance. It is sufficient, if the vessel were seaworthy for the voyage upon which she was destined; and the want of this must be proved by him who affirms the fact, if sufficient causes for her disability, such as storms, &c. are proved. *Aliter*, if no such cause appears. *United States v. Mitchell et al. 3 Wash. C. C. R. 95.*

CHANCERY.

- I. *Accident and mistake.*
- II. *Prevention of fraud.*
- III. *Trusts.* (A) *Ordinary trusts.* (B) *Mortgages.* (D) *Lien of vendor for unpaid purchase money.*
- IV. *Specific performance.*
- V. *Matters of account.*
- VI. *Jurisdiction of the Court.*
- VII. *Chancery practice.*

CHANCERY I.

Accident and mistake.

1. The general rule, both at law and in equity, is, that parol testimony is not admissible to vary a written instrument. *Hunt v. Rousmaniere's Adm.* 8 *Wheat.* 211.

2. But, in cases of fraud and mistake, Courts of Equity will relieve. *Id.* 211.

3. *It seems*, that a Court of Equity will relieve in a case of mistake of *law* merely. *Id.* 211.

4. Where an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. *Hunt v. Rousmaniere's Adm.* 1 *Peters*, 13.

5. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact; a Court of Equity will, in general, grant relief, according to the nature of the particular case in which it is sought. *Id.* 13.

6. A mistake arising from ignorance of law, is not a ground for reforming a deed founded upon such mistake; except in some few cases, peculiar in their characters. *Id.* 16.

7. If the obligee, in a joint bond, by two or more, agree with one of the obligors to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. *Id.* 16.

8. There may be cases in which a Court of Equity will relieve against a plain mistake, arising from ignorance of law. But when the parties upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon. *Id.* 17.

9. Where the purchaser of real estate had bought it, subject to the widow's right of dower, of which right, by proper diligence, he might have been informed, a Court of Equity will not interpose to relieve him, but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed. *Greenleaf v. Queen et al.* 1 *Peters*, 147.

10. Where an agreement is made to lend money, and to take collateral security on property, and by a mistake a power of attorney only is taken, and the party dies,

equity will relieve the creditor, and enforce the original agreement against the administrators, where the estate is insolvent. *Hunt v. Ennis*, 2 *Mason*, 244.

11. If a party takes a security for money, which is merely personal, instead of taking a mortgage on property, under a mistake of law, by all parties, that the former was as safe as the latter, a Court of Equity will not relieve the party who took such security, and substitute for it a lien or mortgage on the property. *Hunt v. Rousmaniere*, 2 *Mason*, 342. 3 *Mason*, 294.

12. Where a farm is sold at so much per acre, if the quantity be mistaken by the parties, a Court of Equity will relieve the party injured by the mistake. In such case the vendee has a right to take the farm at the price of the real number of acres, and to have compensation for the deficiency, if he has paid the consideration. So where the sale is for a gross sum, and there is a positive representation of the quantity by the vendor. But it may be otherwise, if the statement of the quantity be mere matter of description, and not of the essence of the contract; as where the contract contains the words, so many acres, "more or less," or "containing by estimation," &c.; for in such case the vendee may take upon himself the risk of the quantity. But if there be any fraud or wilful misrepresentation of the quantity, equity will afford relief. *Stebbins v. Eddy*, 4 *Mason*, 414.

13. When the mistakes of a surveyor are shown by satisfactory proof, courts of law as well as courts of equity look beyond the patent to correct them. If a mistake is apparent upon the face of a survey, and natural or artificial marks, or the reputation of the neighbourhood have fixed the boundaries of the land different from those delineated by the survey, a subsequent location is so far affected by the real boundaries, that a Court of Equity will not permit a title derived under such location to be set up against the owner of the land intended to have been located by the first survey. *Conn et al. v. Penn et al.* 1 *Peters' C. C. R.* 496.

14. A release to one of two joint obligors, extinguishes the obligation, and equity will not relieve in such a case, although it is most apparent the extinguishment was not intended by the parties. *Willings et al. v. Consequa*, 1 *Peters' C. C. R.* 301.

15. If by mistake a deed be drawn, plainly different from the agreement of the parties, a Court of Equity will grant relief by considering the deed as if it had conformed to the agreement; or if the deed be ambiguously expressed, it may be explained by the agreement. *Hogan v. Delaware Ins. Co.* 1 *Wash. C. C. R.* 419.

16. Where a release is given to one joint debtor, although under a misapprehension of its operating to discharge the co-debtor, a Court of Equity will not relieve from it, unless where there was fraud or unfair practices. *Joy et al. v. Wurtz et al.* 2 *Wash. C. C. R.* 266.

17. Where a conveyance had been made of her real estate by a daughter to her father, immediately before her marriage, under a belief that she would be benefited by the same, and that the property conveyed by the deed would become her's after the decease of her parent; and where the operation of the conveyance was to deprive the daughter of the estate; the Court decreed a conveyance of the property, and an account of the proceeds of the part which had been sold, so as to effect the justice of the case, and to give to the daughter the property to which she would have been entitled, had not the conveyance been made. *Slocum and wife v. Marshall*, 2 *Wash. C. C. R.* 397.

CHANCERY II.

Prevention of fraud.

18. It is a rule both of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's. *Watts v. Lindsey's heirs*, 7 *Wheat.* 158. 161.

19. A post-nuptial voluntary settlement, made by a man, who is not indebted at the time, upon his wife, is valid against subsequent creditors. *Sexton v. Wheaton*, 8 *Wheat.* 229.

20. The statute 13 Eliz. c. 5, avoids all conveyances not made on a consideration deemed valuable in law, as against *previous* creditors. *Id.* 242.

21. But it does not apply to *subsequent* creditors, if the conveyance is not made with a fraudulent intent. *Id.* 238.

22. What circumstances will constitute evidence of such a fraudulent intent. *Id.* 250.

23. A bill in equity brought to rescind a purchase made under the decree of this Court, in *Ferrett v. Taylor*, (9 *Cranch*, 43,) upon the ground, that the title to the property was defective, and could not be made good by the vestry and other persons, who were parties to the former suit. Bill dismissed. *Mason v. Muncaster*, 9 *Wheat.* 445.

24. In general, the answer of one defendant in equity, cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply. *Osborn v. Bank of the United States*, 9 *Wheat.* 738.

25. Where the defendant is restrained by an injunction, from using money in his possession, interest will not be decreed against him. *Id.* 838.

26. An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges. *Id.* 838.

27. In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the Court, (as in the case of a sovereign state,) the rule may be dispensed with. *Id.* 842.

28. A Court of Equity will interpose by injunction, to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities, and stocks. *Id.* 945.

29. Bill to rescind a contract for the exchange of lands dismissed upon the special circumstances of the case. *Carneal v. Banks*, 10 *Wheat.* 181.

30. There must be sufficient equity apparent on the face of the bill to warrant the Court in granting the relief prayed; and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue. *Harding v. Hardy*, 11 *Wheat.* 103. 119.

31. A Court of Equity has jurisdiction of a suit brought by heirs at law, to set aside a conveyance of lands obtained from their ancestor by undue influence, he being so infirm, in body and mind, from old age and other circumstances, as to be liable to imposition, although his weakness does not amount to insanity. *Id.* 125, *S. P. Harding v. Wheaton*, 2 *Mason*, 378.

32. The same jurisdiction may be exercised where one of the heirs at law has, with the consent of the others, taken such a deed, upon an agreement to consider it as a trust for the maintenance of the grantor, and, after his death, for the benefit of his heirs, and the grantee refuses to perform the trust. *Id.* 125, *S. P. Harding v. Wheaton*, 2 *Mason*, 378.

33. Under what circumstances such a conveyance may be allowed to stand as security for actual advances and charges, and set aside for all other purposes. *Id.* 126. *Harding v. Wheaton*, 2 *Mason*, 378.

34. In such a case, not depending on the absolute insanity of the grantor at the time of executing the conveyance, the Court may determine the question of capacity without directing an issue. *Id.* 125.

35. The verdict of a jury as to the *sanity* of the grantor, in such a conveyance, would not be conclusive, the Court may inquire for itself the degree of weakness, or of imposition, and set aside the instrument. *Id.* 125.

36. A question of fact upon a bill filed to set aside a land warrant, upon the ground that it was obtained by

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and taking undue advantage of the party's imbecility of body and mind. *Conner v. Featherstone*, 12 *Wheat*. 199.

37. Evidence deemed insufficient, and bill dismissed. *Id.*

38. Rule of equity, that where land is sold as for a certain quantity, a Court of Equity relieves if the quantity be defective, only applicable to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known, or capable of being ascertained by the vendor. *Dunlap v. Dunlap*, 12 *Wheat*. 575. 579.

39. Relief in equity, against a judgment at law, upon certain bonds given for the indemnity of the obligee, as the endorser of notes drawn by the obligor, the consideration having failed. *Scott v. Shreeve*, 12 *Wheat*. 605.

40. The assignee of such bonds takes them subject to all equities existing between the original parties. *Id.* 608.

41. A purchased ninety-nine hundredths of a tract of land of one hundred acres, belonging to the state, under a settler, and the state granted the one hundred acres to the settler, and the settler had granted one acre to B. Afterwards A obtained from the state with full knowledge of B's title, the same being excepted in his own deed from the settler, a grant of the whole land. *Held*, that B was entitled in equity to have the one acre conveyed to him. *Dunlap v. Stetson*, 4 *Mason*, 349.

42. If a release be given by a creditor to a debtor, where he has been misled by a fraudulent misrepresentation, or other artifice of his debtor, the release may be set aside in equity. But the mere fact that the debtor had made a previous assignment of property, which would be fraudulent as to creditors, if known to the creditor, or if not intended to mislead him, will not alone work such an effect. *Phetliplace v. Sayles*, 4 *Mason*, 312.

CHANCERY III.

Trusts. (A) *Ordinary trust.* (B) *Mortgages.* (D) *Lien of vendor for unpaid purchase money.*

(A) *Ordinary trusts.*

43. To establish the existence of a trust, the *onus probandi* lies on the party who alleges it. *Prevost v. Gratz*, 6 *Wheat*. 481.

44. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief. *Id.* 497.

45. But as length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transactions, it operates, by way of presumption, in favour of innocence, and against imputation of fraud. *Id.*

46. The lapse of forty years, and the death of all the original parties, deemed sufficient to presume the discharge and extinguishment of a trust, proved once to have existed by strong circumstances; by analogy to the rule of law, which after a lapse of time presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances require it. *Id.*

47. A trustee cannot purchase, or acquire by exchange, the trust property. *Wormley v. Wormley*, 8 *Wheat*. 421. 438.

48. Where the trustee, in a marriage settlement, has a power to sell, and reinvest the trust property, whenever, in his opinion, the purchase money may be laid out advantageously for the *cestui que trust*, that opinion must be fairly and honestly exercised; and the sale will be void where he appears to have been influenced by private and selfish interest, and the sale is for an inadequate price. *Id.* 442.

49. *Quere*, How far a *bonæ fidei* purchaser, without notice of the breach of trust, in such a case, is bound to see to the application of the purchase money? *Id.* 442.

50. Where the purchase money is to be reinvested upon trusts that require time and discretion, or the acts of sale and reinvestment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase money. *Id.* 443.

51. But wherever the purchaser is affected with notice of the facts, which, in law, constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud, will not avail him, if the transaction is such as a Court of Equity cannot sanction. *Id.* 447.

52. A *bonæ fidei* purchaser, without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid. *Id.* 449.

53. The general rule that notice to a trustee, or an agent, is notice to the *cestui que trust*, or to the principal, does not extend to the case of an assignee in a deed of trust for the benefit of creditors, made without their knowledge or assent at the time of its execution. In such a case, the assignee is the trustee of the assignor, and not of the creditors; and notice to the assignee of the intent of the assignor to avoid by the conveyance a prosecution for felony, or any other intent contrary to the general policy of the law, will not avoid the deed as to the creditors. *Brooks v. Marbury*, 11 *Wheat.* 78. 87.

54. Where, by the provisions of a deed conveying real property in trust, to be disposed of for the benefit of the creditor of the grantor, the mode of sale prescribed is, by *public auction*, the trustee is bound to conform to this requisition. This was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other; although, by doing so, he might, in reality, promote the interest of those for whom he acted. *Greenleaf v. Queen et al.* 1 *Peters*, 145.

55. Certain property, conveyed in trust to be sold at public auction, was disposed of by private contract, and afterwards, to make a title to the private purchaser, offered at public auction, as prescribed by the trust deed, and the sum bid for it exceeded considerably that for which it had been sold by private contract. *Held*, that whatever might be the liability of the trustee to the *cestui que trust*, to pay the difference between those sums, the alleged breach of trust cannot be urged by the private purchaser as a reason to release him from his contract. *Id.* 146.

56. Full notice of a trust draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. *The Mechanics' Bank of Alexandria v. Louisa & Maria Seton*, 1 *Peters*, 309.

57. It is well settled in equity that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust. *Id.* 309.

58. If a joint purchase be made in the name of one of the co-purchasers, parol evidence is admissible to prove the fact, and he will be held a trustee of a moiety for the other. Such a case is not within the statute of frauds, and is a resulting trust. *Powell v. Monson and Brimfield Manufac. Co.* 3 *Mason*, 347.

59. Where the grantee in a conveyance of a tract of land, had in an account between him and the grantor, made out subsequent to the execution of the deed, given the grantor credit for the proceeds of the sale of part of the land conveyed by the deed, this credit was held to amount to a declaration of trust, so as to repel the idea that the conveyance was intended to be absolute. *Prevost v. Gratz et al.* 1 *Peters*, C. C. R. 364.

60. Where land is conveyed for a consideration which is to be afterwards ascertained by the price at which the grantee may sell it, there arises a resulting trust to the grantor, until the sale is made; and the grantee becomes a trustee, subject to all the equitable rules, which would have bound him had the deed in express terms

empowered him to sell for the use of the grantor ; and the grantor has in both cases an equal interest in the sale, and the same claim upon the best exertions of the grantee to obtain the highest price which the property will command. *Id.*

61. A creditor who after he is so, becomes a trustee for his debtor, does not by that act impair rights which he had antecedently acquired against him. *Id.*

62. Whatever profit is gained by a trustee by the sale of property held by him in trust, belongs to the *cestui que trust* ; and a trustee can never purchase or hold the property, discharged of the equity of the *cestui que trust*, to call upon him, in a reasonable time, to account for the profit, or to have a re-sale. *Id.*

63. A purchase made by a trustee is not absolutely void, but voidable at the election of the *cestui que trust*, if he is dissatisfied with it, and in a reasonable time afterwards, impeaches its validity. But, if after a knowledge of it he acquiesces in it, the sale will be valid both in law and equity. *Id.*

64. Length of time affords no presumption of an acquiescence in a purchase by a trustee of property held by him in trust, unless it appears that the *cestui que trust* had notice that the trustee had become the purchaser. *Id.*

65. If a trustee, executor or agent, buy in debts by his *cestui que trust*, testator, or principal, for less than their nominal amount, the benefit arising therefrom belongs to the person for whom he acted. *Id.*

66. A court of equity will not permit a person acting as a trustee, to create in himself an interest opposite to that of his *cestui que trust* or principal. It is otherwise if the trustee was a creditor before the trust arose, in which case, he may pursue the same legal means for enforcing payment of his debt, which would have been open to him, had he not become a trustee. *Id.*

67. There is no principle of equity which will invalidate the title of a trustee to land, which the *law has taken out of his hands*, and which he has purchased from one appointed to sell it. The reasons which forbid a trustee to purchase the trust property, where he is the seller, do not apply to such a case. *Id.*

68. Of the general validity of post-nuptial settlements. A post-nuptial settlement made by a *stranger* upon the wife is good, unless expressly dissented from by the husband. A post-nuptial settlement made by the husband upon his wife, if for a valuable consideration, is valid ; and even if voluntary, if *bona fide*, and the husband be not indebted at the time, or it be not disproportionate to his means, taking his debts and his situation, into consideration, it is valid. In such a post-nuptial settlement a power of appointment, and to create new trusts may be reserved to the wife, *toties quoties*, and it is no objection to it or to the title derived under the secondary trusts and appointments. Where such a power of appointment is absolute and universal in its terms, the wife may exercise it, and create new trusts on new trusts. The income or profit arising to the wife from such post-nuptial settlements follows the nature of the principal estate, and cannot be taken by the husband or his creditors, but belongs to the wife, and is subject to the control and disposition of the wife. It is her separate property, and when invested by her, will be protected for her use. Into whosoever hands it comes, it is clothed with the trust for her, and not for her husband, even when no trustees are expressly provided for in such a case. If a wife under such circumstances, lives separate from her husband, the furniture, &c. of her house will be presumed to be purchased out of her own property ; and will not, on her death, go to her husband, or his creditors ; but to her own appointee. *Picquet v. Swan, 4 Mason, 443.*

69. *Quere*, Whether a wife making advances out of her separate property to her husband upon an hypothecation of his personal estate may not, in equity, hold the same as against his creditors? *Picquet v. Swan, 4 Mason, 443.*

70. The will of a feme covert, under a power reserved in a settlement, must be proved in our Courts of Probate before it can be acted upon elsewhere, exactly as the wills of persons *sui juris*. The Courts of Probate have exclusive jurisdiction of such questions. *Id.*

71. Where the persons sued as trustees of the husband claim title as appointees

and trustees under the will of the wife, and the will has not been admitted to probate, they cannot be adjudged trustees. *Id.*

72. A resulting trust will arise, where lands have been purchased by one partner, and paid for out of the funds of the partnership. *Philips et al. v. Crammond et al.* 2 Wash. C. C. R. 441.

73. The person entitled to the resulting trust is not obliged to take the land, and to consider the purchaser as his trustee; but he may elect to take the money, and refuse the property. *Id.*

(B) *Mortgages.*

74. Where the mortgage deed contained a defeasance that the mortgagor should pay the debt, according to the condition of a bond recited in the deed, by which it was payable on a day already past, at the time of the execution of the deed: *Held*, that this circumstance did not avoid the mortgage deed in equity, where it was to be considered as a conveyance, absolute at law, but intended as a security merely, and to be treated in the same manner as an ordinary mortgage. *Hughes v. Edwards*, 9 Wheat. 489. 493.

75. A Court of Equity looks to the substantial object of the conveyance, and will consider an absolute deed as a mortgage, wherever it is shown to have been intended merely as a security for the payment of a debt. *Id.* 495.

75. In the case either of a legal or equitable mortgage, the mortgagee may pursue his legal remedy by ejectment, and, at the same time, file his bill to foreclose the equity of redemption. *Id.* 495.

77. A mortgagor cannot redeem after a lapse of twenty years, after forfeiture and possession by the mortgagee, (which period has been adopted in equity by analogy to the statute of limitations,) no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. *Id.* 497.

78. Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged, unless circumstances can be shown to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still subsisting, and the like. *Id.* 497, 498.

79. A *bonæ fidei* purchaser under the mortgagor, with actual notice of the mortgage, or constructive notice by means of a registry, can only protect himself, by the lapse of time, or other equity, under the same circumstances which would afford a protection to the mortgagor. *Id.* 499.

80. Such a purchaser is not entitled to have the value of the improvements made by him deducted from the proceeds of the sale of the mortgaged premises. *Id.* 500.

81. It is true that in discussions in Courts of Equity, a mortgage is sometimes called a lien for debt. And so it certainly is, and something more: it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law; and it is equally true in equity; for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate, and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible. *Conard v. The Atlantic Insurance Company*, 1 Peters, 441.

82. Mortgages may as well be given to secure future advances and contingent debts, as those which already exist and are certain and due. The only question that properly arises in such cases is, the *bona fides* of the transaction. *Id.* 448.

83. A mortgage in fee conveys an estate at law, upon which a real action may be maintained, a release of the equity of redemption does not operate by way of *merger* of the estate conveyed by the mortgage, but as an extinguishment of the equity of redemption. *Dexter v. Harris*, 2 Mason, 531.

84. In equity, where there is a joint-tenancy in a mortgage, the surviving mortgagee will be held a trustee for the representatives of the deceased co-mortgagee. *Randall v. Phillips*, 3 Mason, 378.

85. After a foreclosure by a mortgagee, he is still entitled to recover the balance of the debt due him beyond the value of the mortgaged premises at the time of the foreclosure. *Omaly v. Swan*, 3 *Mason*, 474.

86. Where a mortgage is given by a debtor to his co-debtor to secure the latter against the debt of their creditor, equity considers the mortgagee as a trustee for the creditor; and where a judgment has been recovered, will apply the mortgaged property in satisfaction of the judgment, or remove the incumbrance, so that it may be subjected to execution. *United States v. Sturges*, 1 *Paine*, 525.

87. The principle which governs such cases is that the collateral security is a trust created for the protection of the debt, and that it is the duty of a Court of Equity to see that it fulfils the purpose for which it was intended. *Id.*

88. A judgment creditor who applies to a Court of Equity for its aid to enforce a judgment at law, if he asks its aid to reach a chattel, must show that he has taken out execution at law, and pursued it to every available extent, in order to show a lien upon the chattel: but if the aid is sought as to land, it is enough to show a judgment creating a lien upon the land. *Id.*

89. Although a mortgage be absolute upon the face of it, a Court of Equity will inquire into the real purpose for which it was given, and apply it to that use. *Id.*

90. A mortgage was given in reality to indemnify the mortgagee, but purporting to secure a sum of money payable in one year, and five years afterwards it was assigned, the whole sum appearing from the instrument to be unpaid: *Held*, that the circumstances of the case should have put the assignee upon an inquiry, from which he would have learned the true consideration of the mortgage. *Id.*

(D) *Lien of Vendor for unpaid purchase money.*

91. The vendor of real property, who has not taken a separate security for the purchase money, has a lien for it, on the land, as against the vendee and his heirs. *Bailey v. Greenleaf*, 7 *Wheat*. 46. 50.

92. This lien is defeated by an alienation to a *bona fide* purchaser without notice. *Id.* 50.

93. Nor can it be asserted against creditors holding under a *bona fide* conveyance from the vendee. *Id.* 50.

94. *Quære*, Whether the lien can be asserted against the assignees of a bankrupt, or other creditors coming in under the purchaser by act of law? *Id.* 50.

95. The *dictum* of *Sugden*, in his *Law of Vendors*, 364, examined and questioned. *Id.* 50.

Et vide SALE II. (C.)

CHANCERY IV.

Specific performance.

96. The general rule is, that time is not of the essence of a contract of sale: and a failure on the part of purchaser or vendor to perform his contract, on the stipulated day, does not, of itself, deprive him of the right to a specific performance, when he is able to comply with his part of the engagement. *Brashier v. Gratz*, 6 *Wheat*. 528.

97. But circumstances may be so changed, that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time. In such a case, a Court of Equity will leave the parties to their remedy at law. *Id.*

98. Part performance will, under some circumstances, induce the Court to relieve. *Id.*

99. But where a considerable length of time has elapsed, where the party demanding a specific performance has failed to perform his part of the contract, and the demand is made after a great change in the title and the value of the land, and there is a want of reciprocity in the obligations of the respective parties, a Court of Equity will not interfere. *Id.*

100. A letter of attorney may, in general, be revoked by the party making it, and is revoked by his death. *Hunt v. Rousmaniere*, 8 *Wheat.* 174. 201.

101. Where it forms a part of a contract, and is a security for the performance of any act, it is usually made irrevocable in terms, or, if not so made, is deemed irrevocable in law. *Id.* 201.

102. But a power of attorney, though irrevocable during the life-time of the party, becomes (at law) extinct by his death. *Id.* 202.

103. But if the power be *coupled with an interest*, it survives the person giving it, and may be executed after his death. *Id.* 202.

104. To constitute a power *coupled with an interest*, there must be an interest in the thing itself, and not merely in the execution of the power. *Id.* 204.

105. How far a Court of Equity will compel the specific execution of a contract, intended to be secured by an irrevocable power of attorney, which was revoked by operation of law on the death of the party. *Id.* 207.

106. As a general rule, a Court of Chancery will not decree a specific performance of contracts, except for the purchase of lands or things that relate to the realty, and are of a permanent nature; and where the contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law. But notwithstanding this distinction between personal contracts for goods, and contracts for lands, there are many cases to be found in the books, where specific performance of contracts, relating to personalty, has been enforced in Chancery; and Courts will only weigh with greater nicety contracts of this description, than such as relate to lands. *The Mechanics' Bank of Alexandria v. Louisa and Maria Seton*, 1 *Peters*, 305.

107. A Court of Equity ought not to decree specific performance of a contract, according to the letter, when, from change of circumstances, mistake or misapprehension, it would be unconscionable so to do. The Court may so modify the agreement, as to do justice, as far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires. *The Mechanics' Bank of Alexandria v. Lynn*, 1 *Peters*, 382.

108. In contracts for the sale of land, the undertakings of the respective parties, (the vendor and the vendee,) are always dependent, unless a contrary intimation clearly appears. *The Bank of Columbia v. Hagner*, 1 *Peters*, 464.

109. Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of courts has strongly favoured the latter construction, as being obviously the most just. *Id.* 466.

110. In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal. *Id.* 465.

111. The time fixed for performance is, at law, deemed of the essence of the contract—and if the seller is not able and ready to perform his part of the agreement, the purchaser may elect to consider the contract at an end. But Equity, which from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed. *Id.* 465.

112. It may be laid down as a settled rule, that, at law, to entitle the vendor to recover the purchase money, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser. *Id.* 467.

113. If before the period had arrived when the deed was to be delivered, the defendant had declared he would not receive it, and that he intended to abandon the contract, it might have dispensed with the necessity of a tender. But that rule can

never apply, except in cases when the act which is construed into a waiver, occurs previous to the time fixed for performance. *Id.* 467.

114. The taking possession of the property, by the vendee, before conveyance, is only a circumstance from which to infer that he considered the contract closed; but could not deprive him of the right of relinquishing it, and restoring the possession, if the vendor were unable to make a title to him, or neglected to do it—and in such event, he might sustain an action to recover the purchase money had it been paid. *Id.* 468.

115. Where the vendor had conveyed to the vendee all his right in the property, but the title is such as would drive the vendee into a Court of Chancery to establish it, the Court will not require him to accept it, or pay the purchase money. It would be compelling him to take a law-suit instead of the land for which he had contracted. *Id.* 468.

116. A Court of Equity will not compel the specific performance of a parol agreement to convey lands, in a case in which he who asks the assistance of the Court, is charged with unfair conduct in relation to the contract which he seeks to enforce; but will turn the party away from that *forum*, and leave him to his legal remedy. *Thompson v. Tod*, 1 *Peters' C. C. R.* 380.

117. In a suit for a specific performance of a parol agreement to convey lands, although the defendant answer and admit the agreement, he may, nevertheless, protect himself against a performance of it, by pleading the statute of frauds. *Thompson v. Tod*, 1 *Peters' C. C. R.* 380.

CHANCERY V.

Matters of Account.

118. Under the act of Assembly of Virginia, of October, 1783, for the better locating and surveying the lands given to the officers and soldiers, on continental and state establishments; the state of Virginia has no right to call upon the person who was appointed one of the principal surveyors, to account for the fees received by him, of one dollar for every hundred acres, on delivering the warrants, towards raising a fund for the purpose of supporting all contingent expenses; the bill filed by the Attorney General of the State, to compel an account, not sufficiently averring the want of any proper private parties *in esse* to claim it. *Nicholas v. Anderson*, 8 *Wheat.* 369.

119. *Quærs*, Whether, in such a case, the assignees of the warrants, or a part of them, suing in behalf of the whole, could maintain a suit in equity for an account. *Ib.* 370.

120. A Court of Equity has jurisdiction to decree an account and distribution, according to the *lex domicilii*, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted to be distributed by a foreign tribunal, depends upon the circumstances of the case. *Harvey v. Richards*, 1 *Mason*, 381.

CHANCERY VI.

Jurisdiction of the Court.

121. This Court will not suffer its jurisdiction, in an equity cause, to be ousted, by the circumstance of the joinder or non-joinder of merely *formal* parties, who are not entitled to sue, or liable to be sued, in the United States' Courts. *Wormley v. Wormley*, 8 *Wheat.* 451. *Et vide* Note *a. same page*.

122. In all cases of concurrent jurisdiction, the Court which first has possession of the subject, must determine it conclusively. *Smith v. M'Iver*, 9 *Wheat.*

123. Although Courts of Equity have concurrent jurisdiction with Courts of law, in all matters of fraud, yet, where the cause has already been tried and determined by a Court of law, a Court of Equity cannot take cognizance of it, unless there be the addition of some equitable circumstance to give jurisdiction. *Id.* 534.

124. In such a case, some defect of testimony, or other disability, which a Court of law cannot remove, must be shown, as a ground for resorting to a Court of Equity. *Id.* 534.

125. The rule which requires all the parties in interest to be brought before the Court, does not affect the jurisdiction, but is subject to the jurisdiction of the Court, and may be modified according to circumstances. *Elmendorf v. Taylor*, 10 *Wheat.* 166.

126. The joinder of improper parties, as citizens of the same state, &c. will not affect the jurisdiction of the Circuit Courts in Equity, as between the parties who are properly before the Court, if a decree may be pronounced as between the parties who are citizens of the same state. *Carneal v. Banks*, 10 *Wheat.* 181. 188.

127. In general, the validity of patent of lands can be impeached, for causes anterior to its being issued, in a Court of Equity only. But where the grant is absolutely void, as being issued without authority, or against the positive prohibitions of statute, its validity may be contested at law. *Patterson v. Winn*, 11 *Wheat.* 380. 382.

128. A Court of Chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg v. Baker*, 1 *Peters*, 236.

129. When there is no change of the parties to a suit, during its progress, a jurisdiction depending on the condition of the parties is governed by that condition as it was at the commencement of the suit. *Conolly v. Taylor*, 2 *Peters*, 556.

130. If an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the Court could not exercise jurisdiction while the defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the Court would not hesitate to decree in the cause. *Id.*

131. The suit was originally instituted by aliens and a citizen of the United States as complainants against the defendants, citizens of the United States. In the progress of the cause, and before the final hearing, the name of the citizen of the United States who was one of the plaintiffs, was struck out, and he was made a defendant by the Court. It was held: The substantial parties, plaintiffs, those for whose benefit the decree is sought, are aliens, and the Court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the Court could not take jurisdiction; strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the Court possessed between the alien parties, and all the citizens defendants. There is no objection, founded on convenience or law, to this course. *Id.*

132. A bill, on the equity side of the Court, was filed by all the parties to a release of the defendants, except one, who was a citizen of Pennsylvania. The complainants in the bill were all citizens of another state. To this bill, there was a plea to the jurisdiction of the Court, alleging the want of jurisdiction, because one creditor was not joined in the bill. Held, that the Court had jurisdiction of the case. *Joy et al. v. Wirtz et al.* 1 *Wash. C. C. R.* 517.

133. Davis M'Gee was indebted to the complainant, and after his decease, administration was granted to his effects in New-Jersey, to James M'Gee, the defendant, who, in his answer, stated that he had administered all the effects of the deceased, except 760 dollars, which he was ready to distribute; but claimed that he could be called upon to settle his administration account, only in the state of New-Jersey.

The Court held, that the defendant having stated that he had property in his hands, might be called upon in equity, to account for that property, any where. *Bryan et al. v. M'Gee*, 2 *Wash. C. C. R.* 337.

CHANCERY VII.

Chancery Practice.

134. There is no difference in respect to the conclusiveness of a judgment at law and of a decree in chancery. Both are conclusive as to the facts directly in controversy. *Hopkins v. Lee*, 6 *Wheat.* 109. 113.

135. A decree cannot be pronounced, on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial, by the defendant, of any matter directly charged by the bill, in the defendant's answer, or answer in support of his plea. *Hughes v. Blake*, 6 *Wheat.* 453.

136. A replication to a plea is an admission of the sufficiency of the plea, as much as if it had been set down for argument, and allowed; and all that the defendant has to do, is to prove it in point of fact, and a dismissal of the bill on the hearing is then a matter of course. *Id.*

137. Under what circumstances a plea of a former judgment at law, for the same cause of action, is a good bar in equity. *Id.*

138. Who are necessary parties in equity. *Kerr v. Watts*, 6 *Wheat.* 550. 558.

139. Application of the law of set-off and lien in equity, under peculiar circumstances. *Leeds v. The Marine Insurance Company*, 6 *Wheat.* 565.

140. The decree must conform to the allegations in the pleadings, as well as the proofs in the cause. *Crocket v. Lee*, 7 *Wheat.* 522. 525.

141. Upon a bill of interpleader, filed by underwriters against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment, the rights of the respective parties will be determined. But, on such a bill, those of the co-defendants who fail in establishing any right to the fund, are not entitled to an account from the defendant whose claims are allowed, of the amount and origin of those claims. *Spring v. S. C. Ins. Co.*, 8 *Wheat.* 292.

142. On a bill of interpleader, the plaintiffs are in general entitled to their costs out of the fund. Where the money is not brought into Court, they must pay interest upon it. *Id.* 293.

143. Note on the subject of who are necessary parties to a bill in equity. *Wormley v. Wormley*, 8 *Wheat.* 451, Note a.

144. Practice of Courts of Equity, on judicial sales. *The Monte Allegre*, 9 *Wheat.* 616. 649.

145. A decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, and cannot be founded upon a fact not put in issue by the pleadings. *Carneal v. Banks*, 10 *Wheat.* 181. 188.

146. In the Courts of the United States, wherever the case may be completely decided as between the litigant parties, an interest existing in some other person, whom the process of the Court cannot reach, as if such a party be a resident of another state, will not prevent a decree upon the merits. *Elmendorf v. Taylor*, 10 *Wheat.* 167.

147. A certificated bankrupt or insolvent, against whom no relief can be had, is not a necessary party; but he cannot be examined as a witness in the cause, until an order has been obtained upon motion for that purpose. *De Wolf v. Johnson*, 10 *Wheat.* 384.

148. Exceptions to the report of a master are to be regarded by the Court only so far as they are supported by the special statements of the master, or by a distinct reference to the particular portions of testimony on which the party excepting relies. The Court does not investigate the items of an account, nor review the whole mass of testimony taken before the master. *Harding v. Handy*, 11 *Wheat.* 126.

149. Rule of practice on exceptions to the master's report. *Id.* 127.

150. Testimony of the parties, how far admissible in accounting before the master. *Id.*

151. In a suit in equity brought by heirs at law to set aside a conveyance obtained from their ancestor by fraud and imposition, a final decree for the sale of the property cannot be pronounced until all the heirs are brought before the Court as parties, if they are within the jurisdiction. *Id.* 132.

152. If all the heirs cannot be brought before the Court, the undivided interest of those who are made parties must be sold. *Id.*

153. In general, all incumbrancers must be made parties to a bill of foreclosure; yet, where a decree of foreclosure and sale was made and executed at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing to the Court that there was any prior incumbrance, the proceedings will not be set aside upon the application of the mortgagor, in order to let in the prior mortgagee, who ought regularly to have been made a party, unless it be necessary to prevent irremediable mischief. *Finley v. Bank of the United States*, 11 *Wheat.* 304.

154. *Quære*, Whether such a practice be admissible in any case? *Id.*

155. But in such a case the prior incumbrancers are not bound by the decree in a suit to which they are not parties, and the purchasers under the sale take subject to the prior liens. *Id.*

156. Practice of a Court of Equity as to an award. The Court either enforces the award as made, or sets it aside if in any respect defective; but it is not its practice to confirm the award so far as it extends, and to supply omissions by decree of the Court. *Carnochan v. Christie*, 11 *Wheat.* 466.

157. Where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established without a cross bill filed by the defendant. *Id.*

158. Where an equity cause may be finally decided as between the parties litigant, without bringing others before the Court, who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court, if its process cannot reach them, or if they are citizens of another state. *Nallow v. Hinde*, 12 *Wheat.* 193.

159. But if the rights of those not before the Court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. *Id.*

160. But the Court may, in its discretion, where the purposes of justice require it, retain jurisdiction of the cause on an injunction bill as between the parties regularly before it, until the plaintiffs have had an opportunity of litigating their controversy with the other parties in a competent tribunal; and if it finally appear by the judgment of such tribunal, that the plaintiffs are equitably entitled to the interest claimed by the other parties, may proceed to a final decree upon the merits. *Id.*

161. On a bill filed by an executor against a devisee of lands charged with the payment of debts, for an account of the trust fund, &c. the creditors are not indispensable parties to the suit. The fund may be brought into Court, and distributed under its direction, according to the rights of those who may apply for it. *Potter v. Gardner*, 12 *Wheat.* 500.

162. Although bills of review are not strictly within the statute of limitations, yet Courts of Equity will adopt the analogy of the statute in prescribing the time within which they shall be brought. *Thomas v. Harvie*, 10 *Wheat.* 146. 149.

163. Appeals in Equity causes being limited by the Judiciary acts of 1789, c. 20, s. 22, and of 1803, c. 353, [xciii.] to five years after the decree, the same period of limitation is applied to bills of review. *Id.* 150.

164. *Quære*, Whether a bill of review founded upon matter discovered since the decree, is also barred by the lapse of five years? *Id.* 151.

165. It is in the discretion of the Court to grant leave to file a bill of review for that cause. *Id.*

166. Where a bill had been filed against a trustee of real estate, and after his death administration had been granted to A; who, on the petition of creditors inter-

ested in the trust, was also appointed by the Court the substituted trustee; and the Court went on to decree that A, as trustee, should execute certain conveyances; the decree was held to be invalid; the course of proceeding being rather to make the decree against A, in the character of administrator, because, he claimed, as administrator, under a title derived from the original trustee, and was the person designated by law to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill. *Greenleaf v. Queen et al.* 1 Peters, 148.

167. A decree of a Court of Chancery is erroneous, which, after ordering certain acts to be done, to enable a party to execute certain duties assigned to him, dismisses the bill, as it puts the cause out of Court, and renders the decree ineffectual; and it is no answer to this objection, that it appears by the record, in the case, that the acts ordered to be done, have been performed; since the error is in the decree itself, and not in its execution. *Id.* 148.

168. A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay, in doing so; but this must be done on demurrer, plea or answer, pointing out the person or persons, who, the defendant insists, ought to be made parties. *Id.* 149.

169. When a debtor had conveyed to a trustee, real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the Court, upon the application of the creditors, to execute the trust; in a proceeding, relative to the execution of the trust, and the conveyance of the estate, it is necessary that the heirs at law, of the first trustee, shall be parties to the same, as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal trust. *Id.* 149.

170. After an answer and discovery, the rule is that a suit brought merely for discovery, cannot be revived. The object is obtained, and the plaintiff has no motive for reviving it. *Horsburg v. Baker*, 1 Peters, 236.

171. A bill had been filed originally for discovery, and afterwards became a bill for relief. The relief prayed for was a forfeiture, which might be enforced at law. In such circumstances, it was proper to dismiss the bill, so far as it sought relief on the ground of forfeiture; but it ought to have been dismissed without prejudice to the legal rights of the plaintiff; an absolute dismissal may be considered as a decree against the title claimed by the plaintiff, and sought to be established by the bill. *Id.* 236.

172. When the loss of a deed or other instrument is made the ground for coming into a Court of Equity, for discovery and relief, an affidavit of its loss must be made, and annexed to the bill; and the absence of such affidavit is good cause of demurrer to the bill; but if the party charged failed to demur for that cause, and answered over to the bill, or permitted it to be taken for confessed, by default against him, the absence of the affidavit is not sufficient cause for a reversal of the decree. *Findlay et al. v. Hinde & wife*, 1 Peters, 244.

173. Where in a bill seeking discovery and relief, the complainants relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate; and upon a receipt of the purchase money, binding the party to convey the estate; the person alleged to have executed the last deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus far, so far as he could, divested himself of all title in the same. *Id.* 246.

174. The decree of the Circuit Court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs generally, against all the defendants. All the defendants appealed together to this Court, some of whom held the legal title to the lot,

and all the defendants had an interest in defending this title, standing, as they did, in the relation of vendors and warrantees, and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs; yet, the reversal of the decree of the Circuit Court was made general, as to all of the appellants, and the whole case opened. *Id.* 247.

175. If a deed has not been proved, acknowledged and recorded, and would therefore be insufficient against subsequent purchasers, without notice; parties who claim under such deed, have a right to come into a Court of Equity, for a discovery, upon the ground of notice: and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. *Id.* 245.

176. Although an objection for want of proper parties may be taken at the hearing; yet the objection ought not to prevail upon the final hearing or appeal; except in very strong cases, and when the Court perceives that a necessary and indispensable party is wanting. *The Mechanics' Bank of Alexandria v. Louisa & Maria Seton*, 1 *Peters*, 306.

177. When a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants; in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is more or less, a matter of discretion in the Court; and ought to be restricted to parties, whose interest is so involved in the issue, and to be affected by the decree. The relief granted will always be so modified as not to affect the interest of others. *Id.* 306.

178. It is a well settled rule that a Court is not bound to take notice of any interest acquired in the subject matter of the suit, pending the dispute. *Id.* 310.

179. A defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. *The Mechanics' Bank of Alexandria v. Lynn*, 1 *Peters*, 383.

180. The rules which govern the practice of the Circuit Courts in Chancery have been prescribed by this Court, and ought to be observed. *McDonald v. Smalley et al.* 1 *Peters*, 625.

181. When a judgment debtor comes into a Court, asking protection on the ground that he has satisfied the judgment, the door is fully open for the Court to modify, or grant his prayer, upon such conditions as justice demands. *The Mechanics' Bank of Alexandria v. Lynn*, 1 *Peters*, 384.

182. In proceedings to set aside a conveyance of real estate, executed with a fraudulent intent, it is not necessary to make a mortgagee of the estate a party; his rights being in no way interfered with or brought into question. *Venable et al v. Bank of the United States*, 2 *Peters*, 107.

183. The testatrix directed that the interest of certain funds should be applied to the education of three of her nephews, that they might be fitted and accomplished in some useful trade; and to each of them who should live to finish his education or reach the age of twenty-one years, she gave one hundred pounds to set him up in his trade. She also gave all her "estates and interests, in whatever form existing," to be equally divided among certain persons, who should be living when the interest for the education of her nephews should cease to be applicable, one of them being included in the number among whom the same was to be divided—and she directed that so long as any one of the three nephews should live, who had not finished his education, or arrived at the age of twenty-one years, the division of the property so devised should be deferred, and no longer.

The appellant, one of the nephews, filed a bill against the executors, claiming payment of the sum of money bequeathed for the expenses of his education, and also for a distributive share of the residuary estate due to him under the will. No persons but the executors were made parties to the proceeding; and after a report of the master, the cause came on to be heard, when the bill was dismissed by the Circuit Court for the want of proper parties. At the argument the counsel for the

defendants insisted that not only the two nephews, whose education was provided for by the will, but all the residuary legatees should have been made parties.

Held, that the two nephews who participated with the appellant in the fund applicable to their education, ought to have been made parties to a suit which asked the distribution of that fund, and that they alone were required to be made parties so far as the bill sought the distribution of the said fund. *Dandridge v. Washington's Executors*, 2 *Peters*, 370.

184. The Circuit Court erred in dismissing the bill for want of proper parties, unless the appellant had refused to make such as were really necessary, and then it might have been dismissed without prejudice. It could make no decree for the distribution of the residuum, unless all those entitled to distribution were brought before the Court; but it might grant all other relief to which the appellant might be entitled, on making the two nephews parties. *Id.*

185. In a proceeding instituted solely to obtain a distribution of the fund, which by the terms of the will was to be appropriated to the education of the nephews, the Court did not think the residuary legatees necessary parties. They have undoubtedly an interest in reducing the sum to be allowed out of it to this object, but they have the same interest in reducing every demand on the estate. Whatever remains sinks into the residuum, and that residuum is diminished as well by the claims of creditors and specific legatees, as by this. In all such cases the executors represent the residuary legatees, and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In such suits the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors. *Id.*

186. Where a bill was filed against the stockholders of an unincorporated association, formed for the purpose of carrying on the business of banking, and the process was returned "served" upon some of the parties named in the bill, and as to others, who were not within the reach of the process, "not found;" the Court stated, that it was not meant to say that in cases of this nature it is necessary to bring all the stockholders before the Court, before any decree can be made. It is well known, that there are cases in which a Court of Equity dispenses with such a proceeding when the parties are very numerous, or unknown, and the adoption of the rule would essentially impede, if not defeat, the purposes of justice. *Mandeville et al. v. Riggs*, 2 *Peters*, 482.

187. Upon the death of some of the parties to the bill who were before the Court, the bill ought to have been revived against their personal representatives, if they could be brought before the Court, unless some good reason, such as absolute insolvency, could be assigned to justify the decision. *Id.*

188. In the Circuit Court the bill was dismissed as to those stockholders who were named in the bill, upon whom process was not served; and the decree of dismissal was held to be erroneous. As non-residents, the act of Congress of the 3d of May, 1802, allows proceedings to be had against them by publication in the newspapers in the district. *Id.*

189. An objection was taken at the argument, as to the regularity of the appeal from the Circuit Court to this Court, it having been claimed by all the defendants against whom the decree was made; and the appeal bond having been given by one only. The objection ought to have been taken by way of preliminary motion to dismiss the appeal for irregularity, on account of the failure to give the proper appeal bond. *Id.*

190. Every person interested in the subject matter should, in general, be made a party to a bill in equity. But no one need be made a party, against whom, if brought to a hearing, there can be no decree. *Van Reimsdyk v. Kane et al.* 1 *Gallis*. 371. *Et vide West v. Randall*, 2 *Mason*, 181.

191. A bill to charge the executors of a deceased partner with a partnership debt, where the other party survives, must expressly charge an insolvency of the survivor. *Id.*

192. A certificated bankrupt or insolvent, if discharged from the particular con-

tract, on which relief is sought, need not be made a party to a bill in equity. *Van Reimsdyk, v. Kane et al.* 1 *Gallis*. 371.

193. If the Supreme Court of Probate, on appeal, reverse a decree of distribution made by the Inferior Court, such reversal is no bar to a subsequent suit by the parties claiming as heirs or representatives. *A fortiori*, it is no bar to a bill in equity. *Harvey v. Richards*, 2 *Gallis*. 216.

194. The administrator upon an estate, when the personalty is concerned, is in ordinary cases, a necessary party to a bill in equity concerning said estate. *West v. Randall*, 2 *Mason*, 181.

195. It seems the better opinion that an heir or next of kin, suing for a distributive share of an estate, cannot maintain his bill in equity, without making the other heirs or next of kin parties, or showing them to be without the jurisdiction, or within some other exception. But the rule on this subject does not seem to be inflexible. *Id.*

196. A bill cannot be sustained in equity which is multifarious and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters. *Id.*

197. Effect of lapse of time in equity. *Id.*

198. A Court of Equity may allow an amendment of a bill after deciding against the bill, and allowing a demurrer on argument. *Hunt v. Rousmaniere*, 2 *Mason*, 342.

199. If a creditor has several debts, some of which are secured by mortgage, and some not, it is not gross negligence to unite them all in a single suit at law, and so take single judgment therefor; and if in such case the execution issuing on the judgment is satisfied in part only, a Court of Equity will apply the moneys received on the execution in the first instance to extinguish such parts of the debt and judgment as were not secured by mortgage. *Williams v. Reed*, 3 *Mason*, 405.

200. In general, the doctrine of set-off is the same in equity as at law. *Jackson v. Robinson*, 3 *Mason*, 138.

201. Joint debts cannot be set off in equity any more than at law against separate debts, unless there be some other equitable circumstances. *Id.*

202. Upon a hearing on an issue on a plea in bar to a bill in Chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact. *Hughes v. Blake*, 1 *Mason*, 515.

203. The defendant's answer in support of his plea is good evidence; and unless disproved by two witnesses, or by one witness, and very strong circumstances, it must prevail in his favour. *Id.*

204. Under what circumstances a plea of a former judgment at law for the same cause of action, is a good bar in equity. *Id.*

205. *Semble*, that the exception that a devisee cannot sue out a bill of revivor may be taken by answer, as well as by plea or demurrer. *Slack v. Walcott*, 3 *Mason*, 508.

206. *Quære*, Whether a deviser of land, in a State, where the probate is conclusive, is bound to make the heirs at law parties to an original bill in the nature of a bill of revivor to revive a suit against third persons respecting the land? *Id.*

207. The assignor of a chose in action is not in equity a necessary party where the suit is by the assignee, and the assignment is absolute. *Trecothick v. Austin*, 4 *Mason*, 16.

208. In all bills in equity in the Courts of the *United States*, the citizenship should appear on the face of the bill, to entitle the Court to take jurisdiction, otherwise the bill will be dismissed. If the citizenship be properly averred, and the defendant means to deny the fact of citizenship, he must take the exception by way of plea, and cannot do it by general answer, for it is a preliminary inquiry. *Dodge v. Perkins*, 4 *Mason*, 435.

209. Of the nature and effect of a decree of a Court of Probate, and the parties whom it binds. *Harvey v. Richards*, 2 *Gallis*. 216.

210. A simple reversal, by the Supreme Court, of a decree of the Probate Court

ordering distribution is no bar to a subsequent bill in equity to compel distribution. *Id.*

211. Such reversal is not conclusive in another Court, as to the reasons of appeal; especially if there be several and it do not proceed distinctly upon any one. *Id.*

212. If the complainant in a bill of chancery, does not file a general replication to the answers of the defendant, the answer is to be taken as true, and no evidence can be given by the complainant to contradict it. *Pierce v. West's Executors*, 1 *Peters' C. C. R.* 351.

213. After a cause was set down for hearing on bill and answer, and a reference to the auditor, the plaintiff was allowed to file a general replication. *Id.*

214. Where the original bill contains no allegations against defendants who have nevertheless answered the bill, they having been made parties by permission given by the Court to the complainant, but who did not file an amended bill, if even a proper case for the interference of a Court of Equity were made out, the Court would be compelled to dismiss the bill as against these defendants. *Andrews et al. v. Solomon et al.* 1 *Peters' C. C. R.* 356.

215. If the agreement admitted by the answer differs from that stated in the bill, the plaintiff cannot have a decree, unless he can prove the contract *aliunde*. *Thompson v. Tod*, 1 *Peters' C. C. R.* 380.

216. The general rule is, that if the defendant to a bill in equity answer to the same matter which is covered by his plea, and which by his plea he contends he is not bound to answer, the latter overrules the former. *Fergusson v. O'Harra*, 1 *Peters' C. C. R.* 493.

217. If the plea is only to some part of the bill, the defendant must answer to the residue, unless the matter should be proper for a demurrer. *Id.*

218. In Chancery, where the deposition of a witness has been once taken and closed, it is not the practice to allow him to be re-examined without an order of Court, and then only upon good cause shown. *Peltiplace v. Sayles*, 4 *Mason*, 312.

219. The Court having full power to issue commissions to take testimony abroad, when sitting as a Court of Common Law, will not entertain any proceedings for such a purpose, on its equity side. *Peters v. Prevost*, 1 *Paine*, 64.

220. On exceptions to an answer for impertinence and scandal, Courts of Equity give the answer a liberal consideration, having regard to the nature of the case as made by the bill. *Griswold v. Hill*, 1 *Paine*, 390.

221. An injunction to stay proceedings in ninety-two suits in ejectment, where the parties, pleadings, title, and testimony, were the same in each suit, until one or more could be tried, the remainder to abide the event, refused. A Court of Law can afford the necessary relief in such a case, if it be proper, by a consolidation rule. *Peters v. Prevost*, 1 *Paine*, 64.

222. *Quere*, Whether in such a case a perpetual injunction would be granted against proceeding in the remaining actions after the defendants had obtained successive verdicts in several of the suits. *Id.*

223. If the plea be set down for argument by the complainant, without replying to it, the matter contained in it must be considered as true. *Executors of Gallagher v. Roberts*, 1 *Wash. C. C. R.* 320.

224. A verdict and judgment at law is no bar to relief in equity, if an equitable ground of relief be laid, and that is not denied by the plea. If it be denied, the plaintiff may reply generally, and go into proofs to support the bill; and if he fail to make his proof, the plea will be a good bar, as if no replication had been put in. *Id.*

225. If a bill in equity contain no ground for relief, the defendant ought to demur. *Id.*

226. A and B were indebted to the plaintiff and others; and A having become insolvent, and a commission of bankruptcy having issued against him, the creditors of A and B joined in releasing A from all the debts due to them from the firm of A and B. The commission of bankruptcy being superseded, the plaintiffs filed a bill

on the equity side of the Circuit Court, to set aside the release. Held, that all the parties to the release of A should have joined in the bill; and the demurrer, for want of such parties, was sustained. *Joy et al. v. Wirtz et al.* 1 Wash. C. C. R. 417.

227. Where creditors are to be paid out of a particular fund, or are all united in the same transaction, so as to produce privity between them, all should join in a bill which may bring their proceedings into the consideration of a Court of Chancery. *Id.*

228. To set aside a release in such a case, all the parties to it must apply by name to the Court; and one cannot act for the whole. *Id.*

229. In Chancery, there is a distinction between *active* and *passive* parties; the former being such as are so involved in the subject in controversy, as that no decree can be made without their being in Court; the latter are such as that complete relief can be given to those who seek it, without affecting the interests of the passive parties. *Joy et al. v. Wirtz et al.* 1 Wash. C. C. R. 517.

230. There is no difference between a person who, on account of his residence beyond seas, cannot be made answerable to the process of the Court, and one who, by the laws of the United States, cannot be brought into Court: and wherever, in the former case, a person so circumstanced, need not be made a party, he need not be made a party in the latter case. *Id.*

231. If an answer to any particular charge in the bill deny the same, it must be opposed by the plaintiff, by two witnesses, or by one and circumstances. *Gernon v. Boccaline*, 2 Wash. C. C. R. 199.

232. The plaintiff, having recovered at law, the court directed the costs of the bill of discovery, by which the plaintiffs at law were prevented recovering, should be paid by the defendants in the bill, they being plaintiffs at law. *Bowne v. Brown*, 2 Wash. C. C. R. 271.

233. Sparks and Lloyd being indebted to Johnson and Smith, assigned a mortgage to them in payment, it being understood that the assignors were not to be answerable for the title of the mortgagor to the mortgaged premises. Smith died, leaving Johnson, his surviving partner, who became bankrupt, and the plaintiffs are his assignees. They filed a bill, stating that the mortgagor had no title to the mortgaged premises, and that he was a bankrupt, which was known to the assignors, and concealed at the time of the assignment.

The complainants are the proper persons to ask the relief sought for by the bill, which is to obtain payment of the original debt due by the defendants, notwithstanding the assignment of the mortgage. *Pagan et al. v. Sparks et al.* 2 Wash. C. C. R. 325.

234. The representatives of a deceased partner need not be made parties to a bill filed by the surviving partner, as they have no claim until the partnership debts are paid, and then it is upon the surviving partner, or his representatives. *Id.*

235. It is no objection to the bill that it does not contain an offer to re-assign the mortgage. The court will order this to be done in their decree, if they deem it necessary. *Id.*

236. A perpetual injunction was granted, in order to stay proceedings on a judgment at law, obtained in a suit instituted in the name of a person not interested, whose name was used only for the purpose of preventing a defence, which the defendant had against the real plaintiff in interest. *Greenleaf v. Maher et al.* 2 Wash. C. C. R. 293.

237. An injunction was obtained to stay proceedings on a judgment rendered under the following circumstances. G. drew two bills of exchange in favour of M. and S. who accepted them for the accommodation of G. who afterwards became bankrupt and obtained his certificate. S. made an assignment of certain effects to M. to secure his acceptances, and after the date of the certificate of S. arrested him in New-Jersey; and took from him the note upon which the judgment was obtained, which judgment was for the use of M.

The Court refused to dissolve the injunction, as no money had been paid by S.; but deemed the whole a contrivance to get rid of C.'s discharge under the bankrupt law. *Greenleaf v. Maher et al.* 2 Wash. C. C. R. 44.

238. Where a party dies during term, the judgment may be entered in this Court as of a day antecedent to his death. *Griswold v. Hill*, 1 Paine, 483.

239. But there is this difference in this respect, between its equity proceedings and those of the English Courts of Chancery, that this Court is open only during term, and a decree cannot be entered if the death occurred before the beginning of the term. *Id.*

240. Where an order for the dismissal of a bill was taken *ex parte*, the plaintiff having avowed his intention not to pursue the cause any further, on a motion to vacate the order, on the ground that the defendant died before it was entered: held, that it was not distinguishable in principle from the case of death after agreement, but before judgment, and that the order might be entered antecedent to the death. *Id.*

241. Under special circumstances, as if the defendant in a bill for an injunction be merely nominal, the Court will, on the application of the party really interested, though not a party on the record, direct the answer of the nominal party to be taken under a commission; and notice of such an application to the court is not necessary. *Wilkins v. Jordan*, 3 Wash. C. C. R. 226.

242. Wherever leave to amend a bill is granted, it is more proper to file an amended bill than to interline the original bill. *Peirce v. West's Executor*, 3 Wash. C. C. R. 354.

243. If the bill alleges a particular fact, the plaintiff cannot, in argument, urge that the fact is otherwise. He is bound by his admission; unless, before the hearing, he obtains leave to amend. *Prevoost v. Gratz*, 3 Wash. C. C. R. 434.

244. Under the equity of the Act of Assembly of Pennsylvania, which allows commissions to executors, trustees are entitled to claim them. *Quære*, if trustees are so entitled by the general rules of Courts of Chancery? *Id.*

CONSTITUTIONAL LAW.

- I. *Authority to declare a legislative act unconstitutional, and general rules of interpretation.*
- II. *Powers of Congress.* (A) *Implied powers.* (B) *Power to lay and collect taxes, duties, &c.* (C) *To establish an uniform rule of naturalization, and uniform bankrupt laws.* (E) *To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.* (F) *To provide for calling forth the militia, &c.* (G) *Exercise of other legislative powers.*
- III. *Prohibition to the States to pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, &c.*
- IV. *The judicial power.* (A) *Original jurisdiction of the Supreme Court.* (B) *Appellate jurisdiction of the Supreme Court.* (C) *Jurisdiction of the other Courts of the United States, at common law and in equity.* (D) *Admiralty Jurisdiction.*
- V. *Treason against the United States.*
- VI. *Faith and credit to be given to; manner of proving; and effect of public acts, records and judicial proceedings.*
- VII. *Extent of the provision that treaties shall be the supreme law of the land.*

CONSTITUTIONAL LAW I.

Authority to declare a legislative act unconstitutional, and general rules of interpretation.

1. "Common law" in the constitution means the common law of England. The amendment, respecting trials by jury, restricts the Legislature from granting to an appellate court, in suits at common law, the power of re-examining by a jury, the former decision of another jury, while the judgment below stands unreversed. *United States v. Womun*. 1 *Gallis*. 19.

2. The laws of Congress made in pursuance of the Constitution of the United States, are the supreme laws of the land, any thing in the Constitution or laws of any state notwithstanding. *United States v. Hart*, 1 *Peters' C. C. R.* 890.

CONSTITUTIONAL LAW II.

Powers of Congress. (A) *Implied powers.* (B) *Power to lay and collect taxes, duties, &c.* (C) *To establish a uniform rule of naturalization and uniform bankrupt laws.* (E) *To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.* (F) *To provide for calling forth the militia, &c.* (G) *Exercise of other legislative powers.*

(A) *Implied powers.*

3. To an action of trespass against the Sergeant at Arms of the House of Representatives of the United States, for an assault and battery and false imprisonment, it is a legal justification and bar, to plead, that a Congress was held and sitting, during the period of the trespasses complained of, and that the House of Representatives had resolved that the plaintiff had been guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same; and had ordered that the Speaker should issue his warrant to the Sergeant at Arms, commanding him to take the plaintiff into custody, wherever to be found, and to have him before the said House, to answer to the said charge; and that the Speaker did accordingly issue such a warrant, reciting the said resolution and order, and commanding the Sergeant at Arms to take the plaintiff into custody, &c. and delivered the said warrant to the defendant. By virtue of which warrant the defendant arrested the plaintiff, and conveyed him to the bar of the House where he was heard in his defence, touching the matter of the said charge, and the examination being adjourned from day to day, and the House having ordered the plaintiff to be detained in custody, he was accordingly detained by the defendant, until he was finally adjudged to be guilty, and convicted of the charge aforesaid, and ordered to be forthwith brought to the bar, and reprimanded by the Speaker, and then discharged from custody; and after being thus reprimanded, was actually discharged from the arrest and custody aforesaid. *Anderson v. Dunn*, 6 *Wheat*. *Et vipe* 204. Note a. same case.

(B) *Power to lay and collect taxes, duties, &c.*

4. The Acts of the Legislature of the state of New-York, granting to Robert R. Livingston and Robert Fulton, the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce, so far as the said acts prohibit vessels licensed ac-

cording to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam. *Gibbons v. Ogden*, 9 *Wheat*. 1. 186.

5. The power of regulating commerce, extends to the regulation of navigation. *Id.* 189.

6. The power of regulating commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several states. It does not stop at the external boundary of a State. *Id.* 193.

7. The power to regulate commerce is general, and has no limitations but such as are prescribed in the constitution itself. *Id.* 196.

8. The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be executed by a State. *Id.* 198.

9. State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress. *Id.* 203.

10. The laws of New-York, granting to R. R. L. and R. F. the exclusive right of navigating the waters of that state with steam-boats, are in collision with the Acts of Congress regulating the coasting trade, which being made in pursuance of the constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the state. *Id.* 210.

11. A license under the Acts of Congress for regulating the coasting trade, gives a permission to carry on that trade, and is not merely intended to confer the national character. *Id.* 212. 214.

12. The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers. *Id.* 215, 216.

13. The power of regulating commerce extends to vessels propelled by steam or fire, as well as to those navigated by the instrumentality of wind and sails. *Id.* 219.

14. An act of a State Legislature, requiring all importers of foreign goods by the bale or package, &c. and other persons selling the same by wholesale, bale or package, &c. to take out a license for which they shall pay 50 dollars, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the constitution of the United States which declares, that "no state shall, without the consent of Congress, lay any impost, or duty, on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes." *Brown v. State of Maryland*, 12 *Wheat*. 419.

(C) *To establish an uniform rule of naturalization, and uniform bankrupt laws.*

15. The power of Congress "to establish uniform laws on the subject of bankruptcies throughout the United States," does not exclude the right of the States to legislate on the same subject, except when the power is actually exercised by Congress, and the State laws conflict with those of Congress. *Ogden v. Saunders*, 12 *Wheat*. 213.

16. *Quære*, Whether a general bankrupt law, including any classes besides traders, would be within the powers granted by the constitution to Congress? *Adams v. Storey*, 1 *Paine*, 79.

17. The exercise of the power by the state governments, to pass bankrupt and naturalization laws, is incompatible with the grant of a power to Congress to pass uniform laws on the same subjects. *Golden v. Prince*, 3 *Wash. C. C. R.* 313.

18. The omission of Congress to pass a bankrupt-law, does not authorize the several States to pass such laws; but the omission of that body to pass such a law is, in effect, a declaration that there ought not to be such a law. *Id.*

19. The law of Pennsylvania of 13th March, 1812, is unconstitutional, because it impairs the obligation of a contract; and because Congress have exclusively the power to pass a bankrupt law. *Id.*

(E) *To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.*

20. The Constitution confers absolutely on the government of the Union the powers of making war, and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. *The American Insurance Company v. 356 Bales of Cotton*, 1 Peters, 542.

(F) *To provide for calling forth the militia, &c.*

21. The authority to decide whether the exigencies contemplated in the Constitution of the United States, and the act of Congress of 1795, ch. 101, in which the President has authority to call forth the militia, "to execute the laws of the Union, suppress insurrections, and repel invasions," have arisen, is exclusively vested in the President, and his decision is conclusive upon all other persons. *Martin v. Mott*, 12 Wheat. 19, 29.

22. Although a militia man, who refused to obey the orders of the President, calling him into the public service under the act of 1795, is not, in the sense of the act, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet he is liable to be tried for the offence under the 5th section of the same act, by a Court Martial called under the authority of the United States. *Id.* 34.

23. Where, in an action of replevin, the defendant being a Deputy Marshal of the United States, *avowed* and justified the taking the plaintiff's goods, by virtue of a warrant issued to the Marshal of the District, to collect a fine imposed on him by the judgment of a Court Martial, described as a general Court Martial, composed of officers of the militia of the state of New-York, in the service of the United States, (six in number, and naming them,) duly organized and convened, by general orders, issued pursuant to the act of Congress of February 28, 1795, ch. 101, for the trial of those of the militia of the state of New-York, ordered into the service of the United States in the third military district, who had refused to rendezvous and enter into the service of the United States, in obedience to the orders of the Commander in Chief of the State of New-York, of the 4th and 29th of August, 1814, issued in compliance with the requisition of the President made in pursuance of the same act of Congress, and alleging that the plaintiff, being a private in the militia, neglected and refused to rendezvous, &c. and was regularly tried by the said General Court Martial, and duly convicted of the said delinquency: *Held*, that the *avowry* was good.

24. It is not necessary in such a case that it should appear, in point of fact, that the particular exigency actually existed. It is sufficient that the President has determined it, and all other persons are bound by his decision. *Id.* 32.

25. It is unnecessary to set out the orders of the President. It is sufficient to show, that the Governor of the State called out the militia upon the requisition of the President. *Id.* 33.

26. It is not necessary that the Court Martial for the trial of delinquents, under the act of 1795, ch. 101, should be composed of the precise number of officers required by the rules and articles of war for the composition of General Courts Martial in the army. *Id.* 35.

27. A Court Martial regularly organized, under the act of 1795, ch. 101, does not expire with the termination of a war then existing. *Id.* 37.

28. The President of the United States has a discretionary power to allow such additional number of rations, to officers commanding at separate posts, as he may think just, having respect to the special circumstances of each post. The law, granting this authority is not imperative; and in the exercise of his discretion, the President may allow, or refuse to allow additional rations, as in his opinion he may deem proper. *Parker v. The United States*, 1 Peters, 296.

29. The Secretary of War, as the legitimate organ of the President, under a general authority from him, may exercise the power, and make the allowance, to officers having a separate command. *Id.* 197.

30. No officer is entitled to the additional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the Executive. The allowance cannot be made to more than one officer at the same station. *Id.* 297.

31. In the discharge of his ordinary duties the Adjutant and Inspector General has no distinct command; his duties consist in details of service, and not in active military command. *Id.*

32. An officer may be said to command at a separate post, when he is out of the reach of the orders of the Commander in Chief, or of a superior officer, in command in the neighbourhood. He must then issue the necessary orders to the troops under his command; it being impracticable to receive them from a superior officer. *Id.* 297.

33. Congress have a constitutional right to enlist minors, in the navy or army, without the consent of their parents. *United States v. Bainbridge*, 1 *Mason* 71.

34. Under the navy acts, the consent of the father is not necessary to the valid enlistment of boys in the service. *Id.*

(G) *Exercise of other Legislative Powers.*

35. The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. They do not however participate in political power; they do not share in the government until Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers "Congress to make all needful rules and regulations, respecting the territory, or other property belonging to the United States." *The American Insurance Company v. 356 Bales of Cotton*, 1 *Peters*, 542.

36. The powers of the territorial legislature of Florida, extend to all rightful objects of legislation; subject to the restriction, that their laws shall not be "inconsistent with the laws and constitution of the United States." *Id.* 543.

37. All the laws which were in force in Florida, while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle, by using the words "laws of the territory now in force therein." No laws could, then, have been in force but those enacted by the Spanish government. If among them there existed a law on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over it was conferred by the act of Congress relative to the territory of Florida, on the Superior Court; but jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases as an Inferior Court, would not have been inconsistent with the seventh section of the act, vesting the whole judicial power of the territory in two Superior Courts, and in such Inferior Courts, and Justices of the Peace, as the Legislative Council of the territory may from time to time establish. *Id.* 544.

38. The Judges of the Supreme Courts of Florida hold their offices for four years. These Courts then, are not Constitutional Courts, in which the judicial powers conferred by the constitution on the general government can be deposited. They are incapable of receiving it. They are Legislative Courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power, which is defined in the third article of the Constitution, but so conferred by Congress in the exercise of its powers over the territories of the United States. *Id.* 546.

CONSTITUTIONAL LAW IV.

The judicial power. (A) *Original jurisdiction of the Supreme Court.* (B) *Appellate jurisdiction of the Supreme Court.* (C) *Jurisdiction of the other Courts of the United States at Common Law and in Equity.* (D) *Admiralty jurisdiction.*

(A) *Original jurisdiction of the Supreme Court.*

72. An indictment under the crimes act of 1790, c. 36. (ix.) s. 37. for infracting the law of nations, by offering violence to the person of a foreign minister, is not a case "affecting ambassadors, other public ministers, and consuls," within the 2d section of the 3d article of the constitution of the United States. *The United States v. Ortega*, 11 *Wheat.* 467.

73. The Circuit Courts have jurisdiction of such an offence, under the 11th section of the judiciary act of 1789, c 20. *Id.*

74. *Quere*, Whether the jurisdiction of the Supreme Court is not only original, but exclusive of the Circuit Court, in "cases affecting ambassadors, other public ministers, and consuls," within the true construction of the 2d section of the 3d article of the constitution. *Id.*

75. Note on the jurisdiction of the Courts of the United States over foreign ministers and consuls. *S. C. Note a.* 469.

76. The constitution declares that "the judicial power shall extend to all cases in law and equity arising under it—the laws of the United States and treaties made or which shall be made under their authority :—to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the constitution is conclusive against their identity. *The American Insurance Company v. 356 Bales of Cotton*, 1 *Peters*, 545.

(B) *Appellate jurisdiction of the Supreme Court.*

77. This Court has constitutionally, appellate jurisdiction under the judiciary act of 1789. c. 20, s. 25, from the final judgment or decree of the highest Court of law or equity of a State, having jurisdiction of the subject matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such, their validity; or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed, by either party, under such clause of the constitution, treaty, statute or commission. *Cohens v. Virginia*, 6 *Wheat.* 264. 375. *Montgomery v. Hernandez*, 9 *Wheat.* 129.

It is no objection to the exercise of this appellate jurisdiction, that one of the parties is a state, and the other a citizen of that State. *Id.*

The Court has authority to issue a *habeas corpus*, where a person is imprisoned by the warrant or order of any other Court of the United States. *Ex parte* *Watson*, 38. 41.

The Court has no appellate jurisdiction in criminal cases, confided to it by the constitution of the United States, and cannot revise the judgments of the Circuit

39. Although Admiralty jurisdiction can be exercised in the States, in those Courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territory. In legislating for them, Congress exercises the combined powers of the general and state governments. *Id.* 546.

40. The act of the territorial legislature of Florida, erecting a Court which proceeded under the provisions of the law to decree, for salvage, the sale of a cargo of a vessel which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and constitution of the United States, and is valid; and consequently a sale of the property made in pursuance of it changed the property. *Id.* 546.

41. However individual judges might construe the treaty of St. Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed. *Foster v. Neilson*, 2 *Peters*, 253.

42. After the acts of sovereign power over the territory in dispute, which have been exercised by the legislature, and government of the United States, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own Courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own Courts that this construction is to be denied. *Id.*

43. Under the 3d section of the 4th article of the constitution of the United States, no property belonging to the United States can be disposed of except by the authority of an act of Congress. *United States v. Francis et al.* 1 *Paine*, 646.

44. The War Department has no authority, express or implied, to sell the public property put under its management and superintendence; nor is any such power vested in the Treasury Department. *Id.*

45. A commandant of an arsenal of the United States sold a quantity of lead, belonging to the United States and placed in the arsenal, to the defendants, but afterwards, by a fraudulent collusion with the defendants, converted the sale into a loan of the lead to a third person, who was in a few months to return it to the arsenal, the defendants guarantying its return: on a suit by the United States for the price of the lead, held, that the commandant was a mere agent for safe keeping, and that the sale by him was a tortious act, and the subsequent loan void; but that as no agent or department of the United States had power to sell originally, they could have no powers to waive the tort and affirm the sale for the United States, as in cases of individuals; and that as the Treasury Department had no such authority to sell, their directing the suit to be commenced was not an affirmance of the sale. *Id.*

CONSTITUTIONAL LAW III.

Prohibition to the States to pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, &c.

46. An act of a State legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, so far as it attempts to discharge the contract; and it makes no difference in such a case, that the suit was brought in a State Court of the State, of which both the parties were citizens, where the contract was made, and the discharge obtained, and where they continued to reside till the suit was brought. *Farmers' and Mechanics' Bank v. Smith*, 6 *Wheat*. 131.

47. The act of the state of Kentucky, of the 27th of February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United States, but it was repealed by a subsequent act of the 31st of January, 1812, to amend the said act; and the last mentioned act is also repugnant to the constitution of the United States, as being in violation of the compact between the States of Virginia and Kentucky, contained in the act of the Legislature of Virginia, of the 18th of December, 1789, and incorporated into the constitution of Kentucky. *Green v. Biddle*, 8 *Wheat*. 1. 69.

48. By the common law, the statute law of Virginia, the principles of equity, and the civil law, the claimant of lands who succeeds in his suit, is entitled to an account of mesne profits, received by the occupant from *some period* prior to the judgment of eviction, or decree. *Id.* 74. 81.

49. At common law, whoever takes and holds possession of land, to which another has a better title, whether he be a *bonæ fidei* or a *malæ fidei* possessor is liable to the true owner for all the rents and profits which he has received; but the disseisor, if he be a *bonæ fidei* occupant, may recoup the value of the meliorations made by him against the claim of damages. *Id.* 75. 80.

50. Equity allows an account of rents and profits in all cases, from the time of the title accrued, (provided it does not exceed six years,) unless under special circumstances, as where the defendant had no notice of plaintiff's title, nor had the deeds in which the plaintiff's title appeared in his custody, or where there has been laches in the plaintiff in not asserting his title, or where his title appeared by deeds in a stranger's custody; in all which, and other similar cases, the account is confined to the time of filing the bill. *Id.* 78.

51. By the Civil Law, the exemption of the occupant from an account for rents and profits is strictly confined to the case of a *bonæ fidei* possessor, who not only *supposes* himself to be the true owner of the land, but who is ignorant that his title is contested by some other person claiming a better right. And such a possessor is entitled only to the fruits or profits which were produced by his own industry, and not even to those, unless they were consumed. *Id.* 79.

52. Distinctions between these rules of the Civil and Common Law, and of the Court of Chancery, and the provisions of the acts of Kentucky, concerning occupying claimants of land. *Id.* 81, 82.

53. The invalidity of a State Law, as impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract, *Id.* 84.

54. Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation. *Id.*

55. The compact of 1789, between Virginia and Kentucky, was valid under that provision of the constitution which declares, that "no State shall, without the consent of Congress, enter into any agreement or compact with another State, or with a foreign power:"—no particular mode in which that consent must be given having been prescribed by the constitution; and Congress having consented to the admission of Kentucky into the Union, as a sovereign State, upon the conditions mentioned in the compact. *Id.* 85.

56. The compact is not invalid upon the ground of its surrendering its rights of sovereignty, which are unalienable. *Id.* 88.

57. This court has authority to declare a State law unconstitutional, upon the ground of its impairing the obligation of a contract between different States of the Union. *Id.* 92.

58. The prohibition of the constitution embraces all contracts, executed or executory, between private individuals, or a State and individuals, or corporations, or between the States themselves. *Id.* 92.

59. A bankrupt or insolvent law of any State, which discharges both the person of the debtor and his future acquisitions of property, is not a law "impairing the

obligation of contracts," so far as respects debts contracted subsequently to the passage of such law. *Ogden v. Saunders*, 12 *Wheat*. 213.

60. But a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another State, in the Courts of the United States, or of any other State than that where the discharge was obtained. *Id.* 358.

61. The States have a right to regulate or abolish imprisonment for debt, as a part of the remedy for enforcing the performance of contracts. *Mason v. Hail*, 12 *Wheat*. 370. 378.

62. Where the conditions of a bond for the jail limits, in Rhode Island, required the party to remain a true prisoner in the custody of the keeper of the prison, and within the limits of the prison, "until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue?" *Held*, that a discharge under the insolvent laws of the State, obtained from the proper Court, in pursuance of a resolution of the legislature, and discharging the party from all his debts, &c. and "from all imprisonment, arrest and restraint of his person therefor," was a *lawful discharge*, and that his going at large under it was no breach of the condition of the bond. *Id.* 370.

63. An insolvent debtor who has received a certificate of discharge from arrest and imprisonment under a State insolvent law, is not entitled to be discharged from execution at the suit of the United States. *United States v. Wilson*, 8 *Wheat*. 253.

64. There is nothing in the constitution of the United States which forbids the legislature of a State to exercise judicial functions. *Satterlee v. Matthewson*, 2 *Peters*, 380.

65. There is no part of the constitution of the United States which applies to a State law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract. *Id.*

66. A tax imposed by a law of any State of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is repugnant to the constitution, and an invasion of the government contract. *Weston et al. v. The City Council of Charleston*, 2 *Peters*, 449.

67. It is not the want of original power in an independent sovereign State to prohibit loans to a foreign government, which restrains the State legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action in the exercise of that power from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. *Id.*

68. The clause in the United States constitution, concerning *ex post facto* laws, does not extend to civil rights or remedies. *Society, &c. v. Wheeler*, 2 *Gallis*. 138.

69. *Quare*, Of the power of a State legislature to pass an insolvent law, having the effect of a general statute of bankruptcy? *Van-Reimsdyk v. Kane et al.* 1 *Gallis*. 380.

70. The act of the State of New-York of the 3d of April, 1811, is an insolvent and not a bankrupt law. *Adams v. Storey*, 1 *Paine*, 79.

71. If the act in question, however, had been a bankrupt law, it would not have been void as repugnant to the constitution of the United States. *Id.*

CONSTITUTIONAL LAW IV.

The judicial power. (A) Original jurisdiction of the Supreme Court. (B) Appellate jurisdiction of the Supreme Court. (C) Jurisdiction of the other Courts of the United States at Common Law and in Equity. (D) Admiralty jurisdiction.

(A) Original jurisdiction of the Supreme Court.

72. An indictment under the crimes act of 1790, c. 36. (ix.) s. 37. for infracting the law of nations, by offering violence to the person of a foreign minister, is not a case "affecting ambassadors, other public ministers, and consuls," within the 2d section of the 3d article of the constitution of the United States. *The United States v. Ortega*, 11 *Wheat.* 467.

73. The Circuit Courts have jurisdiction of such an offence, under the 11th section of the judiciary act of 1789, c 20. *Id.*

74. *Quere*, Whether the jurisdiction of the Supreme Court is not only original, but exclusive of the Circuit Court, in "cases affecting ambassadors, other public ministers, and consuls," within the true construction of the 2d section of the 3d article of the constitution. *Id.*

75. Note on the jurisdiction of the Courts of the United States over foreign ministers and consuls. *S. C. Note a.* 469.

76. The constitution declares that "the judicial power shall extend to all cases in law and equity arising under it—the laws of the United States and treaties made or which shall be made under their authority :—to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the constitution is conclusive against their identity. *The American Insurance Company v. 356 Bales of Cotton*, 1 *Peters*, 545.

(B) Appellate jurisdiction of the Supreme Court.

77. This Court has constitutionally, appellate jurisdiction under the judiciary act of 1789. c. 20, s. 25, from the final judgment or decree of the highest Court of law or equity of a State, having jurisdiction of the subject matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such, their validity; or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed, by either party, under such clause of the constitution, treaty, statute or commission. *Cohens v. Virginia*, 6 *Wheat.* 264. 375. *Montgomery v. Hernandez*, 12 *Wheat.* 129.

78. It is no objection to the exercise of this appellate jurisdiction, that one of the parties is a state, and the other a citizen of that State. *Id.*

79. This Court has authority to issue a *habeas corpus*, where a person is imprisoned under the warrant or order of any other Court of the United States. *Ex parte Kearney*, 7 *Wheat.* 38. 41.

80. But this Court has no appellate jurisdiction in criminal cases, confided to it by the laws of the United States, and cannot revise the judgments of the Circuit

Courts, by writ of error, in any case where a party has been convicted of a public offence. *Id.* 41.

81. Hence the Court will not grant a *habeas corpus*, where a party has been committed for contempt adjudged by a Court of competent jurisdiction. *Id.* 41.

82. In such a case, this Court will not inquire into the sufficiency of the cause of commitment. *Id.* 41.

83. The case of *Crosby, Lord Mayor of London*, 3 *Wils.* 188, commented on, and its authority confirmed. *Id.* 41.

84. A commitment for a contempt by a Court of competent jurisdiction, in the exercise of its jurisdiction, is conclusive, and cannot be inquired into in any other tribunal. *Id.* 41.

85. Where a party claiming title to lands under an act of Congress, brought a bill for a conveyance, and stated several equitable circumstances in aid of his title, and the State Court where the suit was brought having dismissed the bill, and the cause being brought to this Court by appeal, under the 25th section of the judiciary act of 1789, c. 20., upon the ground of an alleged misconstruction of the act of Congress under which the title was claimed, by the State Court: *Held*, that this Court could not take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title, but was confined to an examination of the plaintiff's title as depending upon the construction of the act of Congress. *Mathews v. Zane*, 7 *Wheat.* 164. 206.

86. Note on the extent of the appellate jurisdiction of this Court in cases arising in the State Courts under the constitution, treaties, and laws of the Union. 7 *Wheat.* Note a. 206.

87. The appellate jurisdiction of this Court, in cases brought from the State Courts, arising under the constitution, laws, and treaties of the Union, is not limited by the value of the matter in dispute. *Buel v. Van Ness*, 8 *Wheat.* 312. 321.

88. Its jurisdiction in such cases extends to a case where both parties claim a right or title under the same act of Congress, and the decision is against the right or title claimed by either party. *Id.* 323.

89. Under the 25th section of the judiciary act of 1789, ch. 20, where the construction of any clause in the constitution, or any statute of the United States, is drawn in question, in any suit in a State Court, the decision must be against the title or right set up by the party under such clause of the constitution or statute, or this Court has no appellate jurisdiction in the case. It is not sufficient that the construction of the statute was drawn in question, and that the decision was against the title of the party; it must appear that his title depended upon the statute. *Williams v. Norris*, 12 *Wheat.* 117.

90. Where, in such a case, the validity of a statute of any State is drawn in question, upon the ground of its being repugnant to the constitution of the United States, and the decision has been in favour of its validity, it is necessary to the exercise of the appellate jurisdiction of this Court, that it should distinctly appear that the title or right of the party depended upon the statute. *Id.* 124.

91. Where a suit was brought in a State Court upon a marshal's bond, under the act of April 10th, 1806, ch. 21, by a person injured by a breach of the condition of the bond, and the defendants set up as a defence to the action that the suit ought to have been brought in the name of the United States, and the Court decided that it was well brought by the party injured in his own name: *Held*, that the exemption here set up being merely as to the form of the action, and no question arising as to the legal liability of the defendant under the act of Congress, this Court had no authority to re-examine the judgment, so far as respected the construction of that part of the act, which provides, that suits on marshals' bonds "shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards." *Montgomery v. Hernandez*, 12 *Wheat.* 133.

92. The value of a guardian's interest in the minor's estate, is not the value of the estate, but the value of the office of guardian. This is no value, except so far

as it affords a compensation for labours and service; and in a controversy between persons claiming adversely as guardians, having no distinct interest of their own, it cannot amount to a sufficient sum to authorize an appeal to this Court, from a Circuit Court of the District of Columbia. *Ritchie v. Mauro and Forrest*, 2 Peters, 243.

93. This Court has repeatedly decided, that to maintain its jurisdiction in appeals and writs of error, it is not necessary to state in terms on the record, that the constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the judicial act, if the record shows that the constitution, or a law, or a treaty of the United States must have been misconstrued, or the decision could not have been made; or that the constitutionality of a State law was questioned, and the decision was in favour of the party claiming under such law. *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters, 245. *Satterlee v. Matthewson*, 2 Peters, 380.

94. The power of the Court to revise the judgment of a State tribunal, depends on the 25th section of the judiciary act. That section enacts "that a final judgment or decree in any suit in the highest Court of law or equity of a state, in which a decision in the suit could be had," where is drawn in question the validity of a statute, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of their validity, "may be re-examined, and reversed or affirmed in the Supreme Court of the United States." *Weston et al. v. The City Council of Charleston*, 2 Peters, 449.

95. The City Council of Charleston enacted an ordinance, imposing a tax on the six and seven per cent. stock of the United States; and in the Court of Common Pleas of the Charleston District, an application was made for a prohibition to restrain them from levying the tax, on the ground that the ordinance was contrary to the constitution of the United States. The prohibition was granted, and the proceedings in the case were removed to the Constitutional Court, the highest Court of Law in the State; and that Court decided that the ordinance did not violate the constitution of the United States, and a writ of error was prosecuted on this decision to this Court. *Held*, that the question decided by the Constitutional Court was the very question on which the revising power of this Court is to be exercised; and that the writ of error was properly brought. *Id.*

96. A writ of prohibition is a *suit* within the meaning of the 25th section of the judiciary act. The term *suit* is certainly a very comprehensive one, and is understood to apply to any proceeding in a Court of Justice, in which an individual pursues that remedy in a Court of Justice which the law affords him. *Id.*

97. The judgment rendered in the Constitutional Court was a "final judgment" in the sense in which that term is used in the 25th section of the judicial act. The word *final* must be understood in that section, as applying to all judgments which determine the particular cause, and could not have been intended to be confined to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties. *Id.*

98. The measure authorized by the act of the Assembly of the State of Delaware, passed in February, 1822, viz: the construction of a dam across Black Bird Creek, stops a navigable stream, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of Delaware and its citizens; of which this Court can take no cognizance. *Wilson et al. v. Black Bird Creek Company*, 2 Peters, 245.

(C) *Jurisdiction of the other Courts of the United States, at Common Law and in Equity.*

99. The Courts of the United States have jurisdiction of suits by or against executors and administrators, if they are citizens of different States, &c. although their

testators or intestates might not have been entitled to sue, or liable to be sued in those Courts. *Childress v. Emory*, 8 *Wheat*. 642.

100. The act of incorporation of the Bank of the United States, which gives the Circuit Courts of the United States jurisdiction of suits by and against the Bank, is warranted by the 3d article of the constitution, which declares that "the judicial shall extend to *all cases*, in law and equity, arising under this constitution, *the laws of the United States*, and treaties made, or which shall be made, under their authority." *Osborn v. United States Bank*, 9 *Wheat*. 738.

101. The Circuit Courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the Bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a State; and, as the State itself cannot, according to the 11th amendment of the constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the State, who are intrusted with the execution of such laws. *Id.*

102. A State cannot tax the Bank of the United States; and any attempt on the part of its agents and officers, to enforce the collection of such tax against the property of the Bank, may be restrained by injunction from the Circuit Court. *Id.*

103. The Circuit Courts of the Union have jurisdiction, under the constitution, and the acts of April 30th, 1810, ch. 262, s. 29, and of March 3d, 1815, ch. 782, s. 4, of suits brought in the name of "the Postmaster-General of the United States" on bonds given to the Postmaster-General by a deputy Postmaster, conditioned "to pay all moneys that shall come into his hands for the postages of whatever is by law chargeable with postage, to the Postmaster-General of the United States for the time being, deducting only the commission and allowances made by law for his care, trouble, and charges, in managing the said office," &c. *Postmaster-General v. Early*, 12 *Wheat*. 136. 144.

104. The Postmaster-General has authority to take such a bond, under the different acts establishing and regulating the post-office department, and particularly under the act of April 30th, 1810, ch. 262, s. 29. *Id.* 150.

105. The Circuit Courts of the United States have jurisdiction of suits brought by the Bank of the United States against another bank, incorporated under a law of a State, and of which the State itself is a stockholder, together with private individuals, who are citizens of the same State with some of the stockholders of the Bank of the United States. *Bank of the United States v. The Planters' Bank of Georgia*; 9 *Wheat*. 904. *Bank of Kentucky v. Wister*, 2 *Peters*, 318.

106. The Bank of the United States may sue in the Circuit Courts, as endorsee or bearer of a promissory note, although the original payee or endorser could not sue in the same Courts, being a citizen of the same state with the defendants. *Bank of the United States v. The Planters' Bank of Georgia*, 9 *Wheat*. 904.

107. The circumstance that a State is a member of a private corporation, will not give this Court original jurisdiction of suits where the corporation is a party, or oust the Circuit Courts of the jurisdiction vested in them by law. *Id.*

108. Where a judgment has been rendered in a State Court between citizens of different States, and the judgment has been since assigned to a citizen of the same State as the original plaintiff, the Circuit Court has jurisdiction to sustain a bill in equity in favor of the assignee, although the original ground of the suit, on which judgment was rendered, was a negotiable chose in action, on which the Circuit Court could not have held jurisdiction under the restrictive clause of the 11th section of the judiciary act of 1789, ch. 20. *Dexter v. Smith*, 2 *Mason*, 303.

109. The Circuit Court of the United States has jurisdiction in a case between citizens of different states, to sustain a petition for partition, according to the statutes of *Massachusetts* for partition of lands among tenants in common. *Ex parte Biddle*, 2 *Mason*, 472.

110. The jurisdiction of the Supreme Court is pointed out by the constitution; the distribution of the powers of the inferior Courts is regulated and governed by laws by which they are constituted. *Smith v. Jackson*, 1 *Paine*, 453.

111. The Circuit Courts have no supervising power or control over the District Courts other than is given by the laws of the United States ; which is to compel a rendition of a judgment or decree, and to re-examine it on error or appeal. *Id.*

112. To deprive an American citizen of the right of suing in a Circuit Court, on the ground of his not being a citizen of any particular State, there ought to be very strong evidence of his being a mere wanderer without a home. *Rabaud v. D'Wolf*, 1 *Paine*, 580.

113. It is not necessary that a citizen, removing from a territory of the United States, or a State, into another State, should acquire all the rights of a citizen of the State into which he removes, by the laws of such State. It is sufficient if he acquire a domicil there. Yet the declaration must aver that he is a citizen of the State : it is not sufficient to aver that he is a resident. *Callett v. Pacific Ins. Co.* 1 *Paine*, 594.

114. If one make such removal with the avowed object of acquiring a right to sue in the Circuit Courts, but with the intention of a permanent residence, and not to return, it is not a fraud upon the law. *Id.*

115. The constitution of the United States gives jurisdiction to the Courts of the United States, where foreign States are parties ; and the judicial act gives to the Circuit Court, jurisdiction in all cases between aliens and citizens. *King of Spain v. Oliver*, 2 *Wash. C. C. R.* 429.

116. The *United States* may sue, in the District Court, as endorsers of a promissory note, against the maker thereof, although the maker and payee were citizens of the same State, the restriction contained in the 11th section of the judiciary act of 1789, ch. 20, not being intended to apply to suits brought by the United States, or if so intended, being repealed by the act of 1815, ch. 253. *United States in error v. Greene, et al.* 4 *Mason*, 427.

117. Where an administrator sues, as such, and he is a citizen of the same State as the defendant, the Court has no jurisdiction, although the intestate was a citizen of another State. An administrator is, in such case, the real and not a nominal party. *Dodge v. Perkins*, 4 *Mason*, 435.

Where the real parties in the record are not citizens of different States, the Court has no jurisdiction. *Id.*

118. A native citizen of *Rhode Island*, whose father was dead, but whose mother lived on the family estate in *Rhode Island*, went to *New-York* to reside as a merchant, and there failed, and afterwards returned to his mother's family and resided there, being unmarried. At the time when the suit was brought he was in a store in *Connecticut*, acting as clerk for his brother. He was sued as a citizen of *Rhode Island*. There being no proof that he intended a permanent residence in *Connecticut*, it was held by the Court, upon these facts, that he was a citizen of *Rhode Island*. *Catlin v. Gladding*, 4 *Mason*, 308.

119. Where the plaintiff was a citizen of Kentucky, and one of the defendants was a citizen of Pennsylvania, and the other defendant a citizen of New-Orleans, but no process had been served on the latter, the jurisdiction of the Court in the case was maintained. *Shute v. Davis*, 1 *Peters' C. C. R.* 431.

120. While the ejectment was depending, the premises were sold under a mortgage and purchased by Morris, to whom the defendant for a valuable consideration delivered possession of the same ; and afterwards, in fraud of his agreement with Morris, he went to the office of the Clerk of the Court, and confessed a judgment in favour of the plaintiff in the ejectment, upon which a *habere facias possessionem* issued, and the land was delivered to the plaintiff. On motion, the judgment and execution were set aside, and the cause re-instated ; and the Court, in order to maintain its jurisdiction, which would have been lost, had Morris, a citizen of Pennsylvania, the purchaser under the mortgage, been made defendant, ordered that the original defendant should stand, nominally, as the defendant, and that Morris should give him security to pay the costs, &c. *Lessee of Thomas v. Newton*, 1 *Peters' C. C. R.* 444.

(D) *Admiralty Jurisdiction.*

121. A case in Admiralty does not, in fact, arise under the constitution or laws of the United States. Such cases are as old as navigation itself; and the law admiralty and maritime as it existed for ages, is applied by our courts to the cases as they arise. It is not then to the eighth section of the territorial act that we are to look for the grant of admiralty and maritime jurisdiction in the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky. *The American Insurance Company v. 365 Bales of Cotton*, 1 Peters, 545.

122. In cases of seizure in time of peace, for an alleged hostile or piratical aggression in time of peace, the country of the captors and of the captured have concurrent jurisdiction; and where the *res capta* is brought into a port of the captor's country for adjudication, its courts may exercise jurisdiction. *The Marianna Flora*, 11 Wheat. 1. 56.

123. In cases of maritime torts, a Court of Admiralty will sustain jurisdiction where either the person or any of his property is within the territory. It may arrest the person or the property, or by a foreign attachment, the *choses in action* of the offending party. *The Invincible*, 2 Gallis. 41.

124. The Admiralty has exclusive cognizance of suits on ransom bills. *Maisonnaire v. Keating*, 2 Gallis. 341.

125. The Admiralty has jurisdiction of suits in favour of material men. *The Jerusalem*, 2 Gallis. 345.

126. Of the extent of the Admiralty jurisdiction, and the contests of that Court with those of common law. *Id.*

127. The Admiralty has jurisdiction of all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations. The Admiralty has also jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbours within the ebb and flow of the tide. The like causes are within the jurisdiction of the District Courts of the United States by virtue of the delegation of authority "in all civil causes of admiralty and maritime jurisdiction." *De Lovio v. Boit*, 2 Gallis. 398.

128. A policy of insurance is a maritime contract, and therefore of admiralty jurisdiction. *Id.*

129. Courts of common law have a jurisdiction concurrent with Admiralty over maritime contracts. *Id.*

130. The true line of territorial boundary between the *United States* and the *British Provinces* on the bay and waters of Passamaquoddy, is the middle of the stream or channel between the territories of the nation, running the line at low water mark. *The schooner Fame*, 3 Mason, 147.

131. The Admiralty Courts of the United States will entertain jurisdiction *in rem* to enforce a bottomry bond executed in a foreign country, between subjects of a foreign country, where the ship is within the territory of the *United States*. *The Jerusalem*, 1 Gallis. 191.

132. So long as the decree of a Court of Admiralty, foreign or domestic, remains in force, unreversed, it is conclusive to charge the property upon which it operates; and the interference of another Court of co-ordinate jurisdiction, is not authorized, whether the decree is erroneous or not. The sentence of such a Court is not examinable at all in another Court. *Amroyd v. Williams*, 2 Wash. C. C. R. 508.

CONSTITUTIONAL LAW V.

Treason against the United States.

133. A resistance of the execution of a law of the United States, accompanied with any degree of force, if for a private purpose, is not treason. To constitute

that offence, the object of the resistance must be of a public and general character. *United States v. Hoxie*, 1 *Paine*, 265.

134. Indictment for treason in adhering to the enemy, charging the defendant *inter alia*, with going from the British squadron to the state of Delaware, with intention to procure provisions for the squadron. The going from the British squadron to the shore, for the purpose of peaceably procuring provisions for the enemy, did not amount to an act of treason, as this conduct rested in intention, which is not punishable by our laws. *United States v. Pryor*, 3 *Wash. C. C. R.* 234.

135. *Aliter*, if a person has carried provisions towards the enemy, with intent to supply him, though that intention should be defeated. *Id.*

136. By the constitution of the United States, treason "shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort." This crime consists of overt acts, which must be proved by two witnesses, or by the confession of the party in open court. 1 *Burr's trial*, 14.

137. An intention to commit treason is an offence entirely distinct from the actual commission of that crime. *Id.*

138. War can only be levied by the employment of actual force. Troops must be embodied—men must be assembled, in order to levy war. *Id.*

139. The revolutionizing of a territory of the United States, though only as a mean for an expedition against a foreign power, is treason. *Id.* 15.

140. Though the constitution declares that two witnesses are necessary to produce conviction, yet it may not be so strictly and absolutely necessary to authorize an indictment being found a true bill. 1 *Burr's trial*, 196.

141. And it seems, that though there must be two witnesses to the general charge of treason, yet one may be sufficient to prove one act, and another to prove another. *Id.*

142. The term "levying war," as applied to treason in the constitution, is a technical term; and it is reasonable to suppose it is used in that instrument in the same sense in which it was understood in England and in this country, to have been used in the statute of the 25th of Edward III., from which it was borrowed. 2 *Burr's trial*, 402.

143. Those who perform a part in the prosecution of the war may correctly be said to levy war and to commit treason under the constitution. But this opinion, it is observed, does not extend to the case of a person who performs no act in the prosecution of the war—who counsels and advises it—or who, being engaged in the conspiracy, fails to perform his part. To what extent such persons may be implicated is not decided. 2 *Burr's trial*, 405.

144. It would seem from the English authorities, that the words "levying war" have not received a technical, different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility. 2 *Burr's trial*, 413.

145. In point of law, the man who incites, aids, or procures a treasonable act, is not in consequence of that incitement, aid, or procurement, legally present when that act is committed. 2 *Burr's trial*, 426.

146. If the prisoner was not with the party at any time before they reached the scene of the overt act laid in the indictment; if he did not join them there or intend to join them there; if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different state; if the overt acts of treason to be performed by him were to be distinct overt acts; then he was not of that particular party, and was not constructively present aiding and assisting in the particular act which was there committed. 2 *Burr's trial*, 429.

CONSTITUTIONAL LAW VI.

Faith and credit to be given to ; manner of proving ; and effect of public acts, records, and judicial proceedings.

147. The record of a judgment in one state, is conclusive evidence in another, although it appears that the suit, in which it was rendered, was commenced by an attachment of property, the defendant having afterwards appeared, and taken defence. *Mayhew v. Thatcher*, 6 *Wheat.* 129.

148. *Quere*, How far a will of lands, duly proved and recorded in one State, so as to be evidence in the Courts of that State, is thereby rendered evidence in the Courts of another State, (provided the record, on its face, shows that it possesses all the solemnities required by the laws of the State where the land lies,) under the 4th art. sect. 1 of the constitution of the United States? *Darby's lessee v. Mayer*, 10 *Wheat.* 465. 469.

149. A judgment in a State court, is conclusive in every other State, and extinguishes the original ground of action. *Green v. Sarmiento*, 1 *Peters'* C. C. R. 75.

150. Facts, in opposition to the record of a judgment obtained in one State, cannot be alleged to contradict the judgment, in an action brought upon it in another State. A judgment, in one State, is conclusive between the parties in another State. *Field v. Joel Gibbs et al.* 1 *Peters'* C. C. R. 155.

151. The certificate of the presiding Judge of the Court of the State of Louisiana, stating that the person whose name is signed to the attestation of a record, is Clerk of the Court, and that the signature is his own handwriting. is not in conformity with the provisions of the act of Congress. *Craig v. Brown*, 1 *Peters'* C. C. R. 352.

152. The provision in the 2d section of the act of the 3d March, 1797, as to the admission in evidence of authenticated copies of bonds, contracts, and other papers, is not restricted to cases where suits are commenced under the authority given by the first section of the act, but applies to all cases where the evidence is required. *United States v. Lent*, 1 *Paine*, 417.

CONSTITUTIONAL LAW VII.

Extent of the provision that treaties shall be the supreme law of the land.

153. The termination of a treaty, by war, does not divest rights of property already vested under it. *Society, &c. v. New-Haven*, 8 *Wheat.* 489. 491.

154. Nor do treaties in general become extinguished, *ipso facto*, by war between the two governments. Those stipulating for a permanent arrangement of territorial, and other national rights, are, at most, suspended during the war, and revive at the peace, unless they are waived by the parties, or new and repugnant stipulations are made. *Id.* 493.

155. A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in Courts of Justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court. *Foster v. Neilson*, 2 *Peters*, 255.

156. The adoption of a treaty, with the stipulations of which the provisions of a State law are inconsistent, equivalent to a repeal of such law. *Denn. ex dem. Fisher v. Harnden*, 1 *Paine*, 55.

157. A judgment of a State Court in a case where jurisdiction was acquired, not by the common law, but by a statute of the State, which before the rendition of the judgment, had been virtually repealed by the adoption of a treaty, was held not voidable, but void. *Id.*

158. In 1780 the ancestor of the lessors of the plaintiff, a British subject, was indicted in the Supreme Court of New-York, under the act entitled "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this State," &c. ; and in October, 1783, a judgment of forfeiture against his estates was rendered. The treaty of peace stipulating against any subsequent confiscation, was signed in September preceding. Held, that the proceedings were *coram non judice*, and void. *Id.*

159. The stipulations in a treaty between the United States and a foreign nation, are paramount to the provisions of the constitution of a particular State of the confederacy. *Gordon v. Kerr et al.* 1 *Wash. C. C. R.* 322.

CORPORATION.

- I. *Different kinds of corporations, their rights and capacities.*
- II. *Contracts by corporations.*

CORPORATION I.

Different kinds of corporations, their rights and capacities.

1. A corporation for religious and charitable purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation, although it is created by a charter from the government. *Society, &c. v. New-Haven*, 8 *Wheat.* 464. 480.

2. The capacity of private individuals, (British subjects,) or of corporations, created by the crown, in this country, or in Great Britain, to hold land or other property in this country, was not affected by the revolution. *Id.* 481.

3. The proper Courts in this country will interfere to prevent an abuse of the trusts conferred to British corporations holding lands here to charitable uses, and will aid in enforcing the due execution of the trusts ; but neither those Courts, nor the local legislature where the lands lie, can adjudge a forfeiture of the franchises of the foreign corporation, or of its property. *Id.* 483.

4. The property of British corporations, in this country, is protected by the 6th article of the treaty of peace of 1783, in the same manner as those of natural persons ; and their title thus protected, is confirmed by the 9th article of the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for the defect of alienage. *Id.* 489. 491.

5. The act of the legislature of Vermont, of the 30th of October, 1794, granting the lands in that State, belonging to "the Society for Propagating the Gospel in Foreign Parts," to the respective towns in which the lands lie, is void, and conveys no title under it. *Id.* 494.

6. In a suit brought by the President, Directors, and Company of the Bank of the United States, upon a bond given to the bank to secure the faithful performance of

the official duties of one of its cashiers, evidence of the execution of the bond, and if its approval by the board of directors, (according to the rules and regulations contained in the charter of the bank,) is admissible, notwithstanding there was no record of such approval; and the plaintiff may prove the fact of such approval by the board, by presumptive evidence, in the same manner as such fact might be proved in the case of private persons, not acting as a corporation, or as the agents of a corporation. *Bank of the United States v. Dandridge*, 12 Wheat. 64.

7. Where, in such a case, the cashier is duly appointed, and permitted to act in his office, for a long time, under the sanction of the directors, it is not necessary that his official bond should be accepted by the board of directors as *satisfactory*, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or to make his sureties responsible for the non-performance of those duties. The charter and the by-laws are to be considered, in this respect, as *directory* to the board, and not as *conditions precedent*. *Id.* 64. 81.

8. Banks, and other commercial corporations, may bind themselves by the acts of their authorized officers and agents, without the corporate seal. *Fleckner v. U. S. Bank*, 8 Wheat. 338. 357.

9. No subsequent change of the Directors of a bank can require a new notice of a fact communicated to a previous Board. *The Mechanics' Bank of Alexandria v. Louisa and Maria Seton*, 1 Peters, 309.

10. If a corporation, established in a foreign country, sue in our courts, and war intervene pending the suit, this is not sufficient to defeat the action, unless it appear on the record, that the plaintiffs are not within any of the exceptions which enable an alien enemy to sue. *Society, &c. v. Wheeler*, 2 Gallis. 105.

11. It seems that a corporation established in a foreign country, the members of which are aliens, may sue in the courts of the United States. *Id.* 106.

12. Where a new bank was incorporated with the same name as an old bank, whose charter was expiring, the new bank is not responsible for the notes of the old bank, although the major part of the stockholders may be the same in each bank. *Bellows v. Hallowell and Augusta Bank*, 2 Mason, 31.

13. The mere receipt by the officers of a new bank, of the bills of an old bank of the same value, and paying out the same bills, does not make the new bank responsible to pay all the bills of the old bank. *Id.*

14. Whether a charter be a continuation of an old corporation, or the creation of a new corporation, must be decided not by the persons who are stockholders, but by the legislative intent in the act of incorporation. The charter granted by the *Massachusetts* act of 23d of June, 1812, ch. 47, to the Hallowell and Augusta Bank, is not a continuation of the old incorporation of that name. *Id.*

15. An incorporated bank divided *three fourths* of its capital stock, before the expiration of its charter, among the stockholders, without providing funds which ultimately were sufficient to pay its outstanding bank notes. It was held, 1. That the capital stock was a *trust fund* for the payment of the bank notes, and might be followed into the hands of the stockholders. 2. That a bill in equity for such purpose might be maintained by *some* of the holders of the bank notes, against *some* of the stockholders, the impossibility of bringing all before the Court being sufficient to dispense with the ordinary rule of making all parties in interest parties. 3. That in such case the decree against the stockholders before the court, should be only for their contributory share of the debt, in the proportion which the stock held by them bore to the whole capital stock. 4. That the holder of bank notes, payable to *bearer*, is not an assignee of a *chose in action*, within the 11th section of the judiciary act of 1789, ch. 20, limiting the jurisdiction of the Circuit Court. *Wood v. Dunmer*, 3 Mason, 308.

16. A cashier of a bank has *prima facie* authority to endorse, on behalf of the bank, negotiable securities held by it. If there be any restriction of his authority, it must be proved by the bank. *Wild v. Bank of Passamaquoddy*, 3 Mason, 505.

17. The scrip or certificate holders in the New England Mississippi Land Company hold their shares under the Company itself, as a part of the common capital stock, and are not considered as holding derivatively, and solely as individual sub-

purchasers under the separate original titles of the original purchasers from the Georgia Mississippi Company, so as to be affected by any circumstances of defect in these separate original titles; those titles being in fact now vested in the trustees of the New-England Mississippi Company itself, as part of its common stock, and not in the individual holders. *Gilman v. Brown et al.* 1 *Mason*, 191.

18. The king of Great Britain granted a charter of a town in that part of the province of New-Hampshire which is now Vermont, to be divided among the grantees, and to be held on certain conditions mentioned in the charter. The defendants, who were one of the grantees, were a Society in England incorporated by a charter from the King, a *scire facias* was issued on behalf of the plaintiffs, requiring the defendants to show cause why a forfeiture of their right to the lands had not been incurred, and assigning as grounds of forfeiture a non-performance of the conditions on which the lands were held, and violations of their charter of incorporation. On demurrer to the *scire facias*, held, that such violation of the charter of incorporation could not be thus collaterally drawn in question, but that it should be vacated by some direct proceeding for the purpose. *People of Vermont v. Society for Propagating the Gospel*, 1 *Paine* 652.

19. Among the conditions of the grant were, that the grantees, their heirs and assigns, should pay rent and cultivate a certain portion of land: Held, that no reasons of public policy exempted the defendants from the performance of these conditions, and that they were within their letter and spirit. *Id.*

20. Each grantee was to pay annually for the first ten years, an ear of corn, rent, for his share of the land, if lawfully demanded: Held that this was a mere nominal rent, and its non-payment not a ground of forfeiture, and that the breach of the condition was ill assigned, as there was no averment that it had been lawfully demanded. *Id.*

21. After the first ten years a rent of one shilling for every hundred acres was to be paid annually to the grantor, in his council chamber in Portsmouth, or to such officer as should be appointed to receive the same: Held that payment at the place appointed had been rendered impossible by the separation of the countries, and that the plaintiffs should have averred that they had appointed another place of payment, or an officer to receive the payment, and that notice thereof had been given to the defendants. *Id.*

22. *Quære*, Whether a corporation is a *person*, within the meaning of the act of Congress? *United States v. Johns*, 1 *Wash. C. C. R.* 364.

CORPORATION II.

Contracts by Corporations.

23. The statutes of usury of England, and of the States of the Union, expressly provide that usurious contracts shall be utterly void; but, without such a provision, they are not void as against parties who are strangers to the usury. *Fleckner v. U. S. Bank*, 8 *Wheat.* 355.

24. The statute, incorporating the Bank of the United States, does not avoid securities on which usurious interest may have been taken, and the usury cannot be set up as a defence to a note on which it is taken. It is merely a violation of the charter, for which a remedy may be applied by the government. *Id.* 355.

25. Municipal corporations, acting within the limits of the powers conferred upon them by the legislature, in the exercise of a special franchise granted to them, and the performance of a special duty imposed upon them, are responsible for the acts and contracts of their agents, duly appointed and authorized, within the scope of the authority of such agents, in the same manner as other corporations and private individuals are responsible on their promises, express and implied. *Clark v. The Corporation of Washington*, 12 *Wheat.* 40.

26. Where, by the charter granted by Congress to the city of Washington, the corporation was empowered "to authorize the drawing of lotteries," for effecting certain improvements in the city, and upon certain terms and conditions: Hel

that the corporation was liable to the holder of a ticket in such a lottery for a prize drawn against its number, although the managers appointed by the corporation to superintend such lottery were empowered to sell, and had sold the entire lottery to a lottery dealer for a gross sum, who was, by his agreement with them, to execute the details of the scheme as to the sale of the tickets, the drawings, and the payment of the prizes. *Id.* 40.

27. *It seems*, that the power granted in the charter, "to authorize the drawing of lotteries," cannot be exercised so as to discharge the corporation from its liability, either by granting the lottery, or selling the privilege to others, or in any other manner; but the lotteries to be authorized by the corporation must be drawn under its superintendence, for its own account, and on its own responsibility. *Id.* 40.

28. The act incorporating the Bank of the Commonwealth of Kentucky, contains a provision by which it is enacted, that the Bank shall receive money on deposit without being required to give an obligation under seal to repay it. This enactment must be construed with regard to the practice of banking, and the understanding of mankind; and must create a liability to the depositor by the simple act of depositing, that is, an *assumpsit* in law, implied from an act *in pais*. *Bank of Kentucky v. Wister*, 2 *Peters*, 319.

29. Upon the deposit being made in the Bank of the Commonwealth of Kentucky, the cashier gave under his hand a certificate that there had been "deposited to credit of the plaintiff below, \$7730.81, which is subject to their order on presentation of this certificate." The deposit was made in the notes of the Bank, and when the same were deposited, and when demand of payment was made, the notes were passing at one half their nominal value. When the certificate was presented to the Bank, the cashier offered to pay the amount in the notes of the Bank, but he refused to receive payment in any thing but gold or silver. The language of the certificate is expressive of a general not a specific deposit, and the act of incorporation is express, that the Bank shall pay and redeem their bills in gold or silver. The transaction then was equivalent to receiving and depositing the gold or silver; and if the Bank did not so understand it they might have refused to receive it; and the plaintiff would certainly have recovered the gold and silver, to the amount upon the face of the bills. *Id.*

30. The Bank having offered to pay the amount of the certificate in their bills, they put their own construction on the same, and they cannot afterwards say that the plaintiffs below should have accompanied the certificate with a check. *Id.*

COURTS OF THE UNITED STATES.

- I. *Courts of the United States in general.*
- II. *The Supreme Court.*
- III. *Circuit Courts.*
- IV. *District Courts.*

COURTS OF THE UNITED STATES I.

Courts of the United States in general.

1. The Courts of the United States are Courts of *limited* but not of *inferior* jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause, on a writ of error and appeal; but, until

reversed, they are conclusive evidence between parties and privies. *McCormick and Wife v. Sullivan*, 10 *Wheat.* 192. 199.

2. The complainants are stated to be citizens of the State of South Carolina. The defendant, the Bank of the State of Georgia, is a body corporate; but the citizenship of the individual corporators is not stated. The averment in the original bill is, that "William B. Bullock and Samuel Hale are citizens of Georgia, residents therein." William B. Bullock is subsequently designated, as "President of the Mother Bank, and Samuel Hale, as President of the Branch Bank at Augusta, in the State of Georgia." There are three amendments to the bill; but there is in none of them, any further averments. *Held*, that this is not a case within the jurisdiction of the Courts of the United States. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations or averments, that the same was the fact, as to the stockholders of the Bank. *Briethaupt et al. v. The Bank of Georgia*, 1 *Peters*, 228.

3. It cannot be alleged, that a citizen of one State, having title to lands in another State, is disabled from suing for those lands in the Courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. *McDonald v. Smalley et al.* 1 *Peters*, 623.

4. M'Arthur, a citizen of Ohio, apprehensive his title to lands in that State could not be sustained in the Courts of the State, in which alone he could sue; and being indebted to M'Donald, a citizen of Alabama, in the sum of \$1100, offered to sell and convey to him the land, in payment of this debt. The letter in which the offer was made expresses the opinion that his title was good, and would most probably be established in the Courts of the United States, but would fail in the Courts of the State. He estimates the property as being worth much more than the sum he is willing to take for it, but in consequence of the difficulties attending the title, he is willing to convey it in satisfaction of the debt. The contract was concluded, and M'Donald gave his bond to a third party for a quit claim title to the land, on condition of receiving from him eleven hundred dollars. *Held*, that the title acquired by M'Donald gave jurisdiction to the Courts of the United States. *Id.* 623.

5. The motives which induced M'Arthur to make this contract, whether justifiable or censurable, can have no influence on its validity. A Court cannot enter into them, when deciding on its jurisdiction. *Id.* 624.

6. In a contest between a mortgagor and mortgagee, being citizens of different States, it cannot be doubted that an ejectment, or a bill to foreclose, may be brought by the mortgagee, residing in a different State, in a Court of the United States. *Id.* 624.

7. The libel and claim exhibited a demand for money actually in the Treasury of the State of Georgia, mixed up with the general funds of the State, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful to employ. *Held* that the Courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendments to the constitution of the United States. *Id.* 123.

8. Of the practice on contempts. If the party purge himself on oath, the Court will not hear collateral evidence for the purpose of impeaching his testimony, and proceeding against him for the contempt. But if perjury appear, the party will be recognised to answer, &c. *United States v. Dodge*, 2 *Gallis*. 313.

9. The laws of the several states as to rights, furnish rules of decision for the federal Courts under certain qualifications; but, as to remedies, they have no binding force in these Courts. *Campbell et al. v. Claudius*, 1 *Peters' C. C. R.* 484.

10. The Courts of the United States having equity as well as legal jurisdiction, the practice of the Courts of Pennsylvania is not allowed, which permits the jury to find a conditional verdict where the equity of the case may require it. *Conn et al. v. Penn et al.* 1 *Peters' C. C. R.* 497.

11. A secretary, attached to the Spanish legation, is entitled to the protection of the laws of nations, against any civil or criminal prosecution; but the Circuit Court cannot discharge him from criminal process, issued under the authority of the State of Pennsylvania. *Ex parte Cabrera*, 1 *Wash. C. C. R.* 232.

12. The Courts of the United States and the Justices thereof, are only authorized to issue writs of *habeas corpus* to prisoners in jail, under, or by colour of the authority of the United States; or committed by some Court of the United States; or required to testify, in a cause depending in a Court of the United States. *Id.*

13. The jurisdiction of the Courts of the United States is limited; and the inferior Courts can exercise it only in cases in which it is conferred by an act of Congress. *Id.*

14. The laws of the United States which punish those who violate the privileges of a foreign minister, are equally obligatory on the State Courts as upon those of the United States; and it is equally the duty of each to quash proceedings against any one having such privileges. *Id.*

15. The injured party may seek his redress in either Court, against the aggressor; or he may prosecute, under the 26th section of the law. *Id.*

16. The Circuit Court cannot quash proceedings against a public minister, depending in a State Court, nor can the Court in any way interfere with the jurisdiction of the Courts of a State. *Id.*

17. *Quære*, Whether an individual who has rights under a judgment of the United States can have a remedy for a violation of those rights, by a suit in the name of the United States, or must resort to an action for consequential damages in his own name? *United States v. Thomas Morris*, 1 *Paine*, 209.

18. *Quære*, Whether an action can, in any case, be brought for an individual in the name of the United States, by any attorney other than the District Attorney, he refusing to bring it? *Id.*

19. The laws of the several States, constitutionally passed since 1789, are binding on the Courts of the United States, held within the State in which the same prevail. *Golden v. Prince*, 3 *Wash. C. C. R.* 313.

20. *Aliter*, as to rules of practice. Every court possesses the power of making its own rules of practice, unless forbidden by law; and the 17th section of the judiciary law vests, expressly, this power in the courts of the United States. *Id.*

21. The laws of the several States, as to the practice and proceedings in their Courts, are not obligatory on the Courts of the United States; and therefore the Act of the Assembly of Pennsylvania, of 2d January, 1815, as to copies certified by a notary public, is not applicable in this Court: all proper interrogatories must be answered on both sides, or the deposition cannot be read. *Bell v. Davidson*, 3 *Wash. C. C. R.* 329, S. P. *Craig v. Brown*, 3 *Wash. C. C. R.* 502.

22. Citizenship, when spoken of in the constitution in reference to the jurisdiction of the Courts of the United States, means nothing more than residence. *Cooper v. Galbraith*, 3 *Wash. C. C. R.* 547.

23. If a citizen of one State thinks proper to change his domicile, and to remove with his family, if he have one, to another State, with a *bona fide* intention to reside there, he becomes instantly a citizen of that State, and may sue in the Courts of the United States as such. *Id.*

COURTS OF THE UNITED STATES II.

The Supreme Court.

24. A division of the Judges of the Circuit Court, on a motion for a new trial, in a civil or criminal case, is not such a division of opinion as is to be certified to this Court for its decision, under the 6th section of the judiciary act of 1802, c. 291. [xxi.] *United States v. Daniel*, 6 *Wheat.* 542.

25. A decree of the highest Court of Equity of a State, affirming the decretal order of an inferior Court of Equity of the same State, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the 25th section of the judiciary act of 1789, c. 20, from which an appeal lies to this Court. *Gibbons v. Ogden*, 6 *Wheat.* 448.

26. The jurisdiction of this Court is not affected by the joinder or non-joinder of mere formal parties in an equity suit. *Wormley v. Wormley*, 8 *Wheat.* 451.

27. Its jurisdiction, in a case arising under the occupying claimant laws of Kentucky, is not excluded by the tribunal appointed by the compact of 1789, between Virginia and Kentucky. *Green v. Biddle*, 8 *Wheat.* 90.

28. *Quære*, As to the authority of this Court to interfere, by mandamus, in the case of the removal or suspension of an attorney of the District and Circuit Courts. *Ex parte Burr*, 9 *Wheat.* 529.

29. Whatever may be the authority of this Court in that respect, it will not be exercised unless where the conduct of the Court below has been grossly irregular and unjust. *Id.* 530.

30. In a regular complaint against an attorney, charges cannot be received and acted on, unless made on oath. But he may himself waive the preliminary of an affidavit, and the Court may proceed, at his instance, to investigate the charges upon testimony, which must be on oath, and regularly taken. *Id.* 530.

31. In replevin, if it be of goods distrained for rent, the amount for which avowry is made, is the value of the matter in controversy; and if the writ be issued to try the title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in controversy, so as to give jurisdiction to this Court upon a writ of error. *Peyton v. Robertson*, 9 *Wheat.* 527.

32. It has been the uniform course of this Court, with respect to titles to real property, to apply the same rule which is applied by the State tribunals in like cases. *Waring v. Jackson*, 1 *Peters*, 571.

33. The Supreme Court of the United States has jurisdiction of appeals from the Orphans' Court of Washington county in the District of Columbia, through the Circuit Court of the same county, by virtue of the act of Congress of February, 1801; and by the act of Congress, subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of 1000 dollars in order to entitle the party to an appeal. *Nicholls et al. v. Hodges' Executors*, 1 *Peters*, 565.

34. The Court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded two thousand dollars, the title to a lot of ground, part of the whole tract, which was of less value than 500 dollars, was only involved in the case before the Court. *Old Grant on the demise of Mccredith v. M'Kee et al.* 1 *Peters*, 248.

COURTS OF THE UNITED STATES III.

Circuit Courts.

35. The Circuit Court has jurisdiction of a suit brought by the endorsee of a promissory note, who is a citizen of one State, against the endorser, who is a citizen of a different State, whether a suit could be brought in that Court by the endorsee, against the maker, or not. *Young v. Bryan*, 6 *Wheat.* 146.

36. In order to maintain a suit in the Circuit Court, the jurisdiction must appear on the record; as if the suit is between citizens of different States, the citizenship of the respective parties must be set forth. *Sullivan v. The Fulton Steam-Boat Company*, 6 *Wheat.* 450.

37. An endorsee of a promissory note, who resides in a different State, may sue, in the Circuit Court, his immediate endorser, residing in the State in which the suit is brought, although that endorser be a resident of the same State with the maker of the note. *Mollan v. Sorranee*, 9 *Wheat.* 537.

38. But where the suit is brought against a remote endorser, and the plaintiff, in his declaration, traces his title through an intermediate endorser, he must show that this intermediate endorser could have sustained his action in the Circuit Court. *Id.* 537.

39. A plea to the jurisdiction of the Circuit Court, must show that the parties were citizens of the same State, at the time the action was brought, and not merely at the time of the plea pleaded. The jurisdiction depends upon the state of things at the time of the action brought; and after it is once vested, it cannot be ousted by a subsequent change of residence of either of the parties. *Id.* 539.

40. In an equity cause, the *res* in litigation may be sold by order of the Circuit Court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal to this Court. *Spring v. The South Carolina Insurance Company*, 6 *Wheat.* 519.

41. An injunction out of the Circuit Court, to stay proceedings on a judgment at law, in that Court, may issue notwithstanding the pendency of a writ of error on the judgment in this Court. *Parker v. Judges of the Circuit Court of Maryland*, 12 *Wheat.* 561.

42. The Circuit Court has authority to allow amendments in revenue causes, on proceedings *in rem*, brought by appeal from the District Court. *Anonymous*, 1 *Gallis.* 22.

43. Under the act, 1809, ch. 94, if the disability of the District Judge terminates in his death, the Circuit Court must remand the certified causes to the District Court. *Ex parte United States*, 1 *Gallis.* 338.

44. No appeal lies from the District Court to the Circuit Court, in any causes, except civil causes of Admiralty and maritime jurisdiction. A writ of error is the proper process to correct the errors of the District Court in common law actions. *United States v. Wonson*, 1 *Gallis.* 5.

45. Where a cause has once been tried by a jury in the District Court, there cannot, even supposing an appeal lay, be a new trial by a jury at the Circuit Court. *Id.*

46. Where the principal is confined in gaol under the *messe* civil process of a State Court, the Circuit Court has no authority to issue a *habeas corpus* for the purpose of bringing him in to be surrendered in discharge of his bail. *United States v. French*, 1 *Gallis.* 2.

47. Nor will the Court, merely on account of such impediment, discharge the bail, who have become bound for the appearance of the party to answer to a criminal information; but in their discretion the Court will respite the recognizance. *Id.*

48. Whether the Circuit Court of the United States has jurisdiction over common law offences against the United States. *U. States v. Coolidge*, 1 *Gallis.* 488.

49. The Circuit Court has cognizance under the act, 1790, ch. 9, sec. 8, of piracy on board of an American ship, although committed in an open roadstead, adjacent to a foreign country, and within a half mile of the shore. *United States v. Ross*, 1 *Gallis.* 524.

50. Upon a judgment rendered on proceedings under the 10th section of the patent act of 21st of February, 1793, ch. 11, in the nature of a *scire facias* at common law to repeal a patent, error lies to the Circuit Court. *Stearns v. Barrett*, 1 *Mason.* 153.

51. Upon a bank note, payable to *W. Pitt*, or bearer, the Circuit Court has jurisdiction to enforce payment, in favour of a holder who is citizen of another state, although it is not shewn that *W. Pitt* is a fictitious person, or a citizen of another State; the prohibition of the act of 24th September, 1789, ch. 20, sec. 11, not applying to such a note. *Bullard v. Bell*, 1 *Mason.* 243.

52. The Circuit Court has no jurisdiction in causes of Admiralty and maritime jurisdiction, except over the *final* decrees of the District Court. *The brig Hollen*, 1 *Mason.* 431.

53. The Circuit Court has no jurisdiction of suits between citizens of different States, except where one of the parties is a citizen of the State where the suit is brought. *White v. Fenner*, 1 *Mason.* 521.

54. A bill in equity lies in the Circuit Court to set aside conveyances made in fraud of creditors, (the parties being citizens of different States) for there is not, in the proper sense of the term, "a plain, adequate and complete remedy" at law, within the meaning of the 16th section of the judiciary act of 1789, ch. 20,

which is merely affirmative of the general doctrines of Courts of Equity. *Beau v. Smith*, 2 *Mason*, 252.

55. The constitution of the United States declares that Congress shall have power to exercise "exclusive legislation in all cases whatsoever" over all places purchased by the consent of the legislature of a State in which the same shall be for the erection of forts, &c. Held, that the right of exclusive legislation carries with it the right of exclusive jurisdiction; and where a murder is committed within a fort so purchased, with the consent of a State legislature, the Circuit Court has jurisdiction over the offence under the act of 1790, ch. 9, sections, 3 and 7, although in the cession the State received a right to execute the civil and criminal processes issuing under State authority, in such places. *U. States v. Cornell*, 1 *Mason*, 69.

56. The Circuit Court of the United States has jurisdiction in a case between citizens of different States to sustain a petition for partition, according to the statutes of *Massachusetts* for the partition of lands among tenants in common. *Ex parte Biddle*, 2 *Mason*, 472.

57. Where a cause is removed from a State Court into the Circuit Court, under the act of Congress, the plaintiff is entitled to recover his costs, although he has a verdict for less than five hundred dollars. *Ellis v. Jarvis*, 3 *Mason*, 457.

58. A bill in equity to enjoin a judgment lies in the Circuit Court, where the judgment is given, although the original plaintiff resides in, and is a citizen of another State. Such a bill is not an original suit, within the sense of the 14th section of the judiciary act of 1789, ch. 20.

A release to a third person of the right to the land in controversy in the original suit is not an extinguishment of the right to maintain such a bill for an injunction and relief, where the equity is a mere possibility or constructive equitable trust, created by the decree of the Court of Equity. Such an equity is not assignable, for it has no existence but by the decree of the Court, subsequently made. Such an equity is not in a correct sense, "any right, title, or interest, in the land" itself, so as to pass by a conveyance with those words of grant. *Dunlap v. Stetson*, 4 *Mason*, 349.

59. On a reversal of judgment in an action brought by writ of error from the District Court of *Maine*, the Circuit Court may, if justice require, award a *venire facias de novo* triable at the bar of the Circuit Court. *United States v. Sawyer*, 1 *Galles*, 86.

60. The Circuit Court will discharge on common bail, a defendant, who has been arrested for a debt contracted in the State in which he has, subsequent to its commencement, been discharged by the insolvent laws of the State. *Read v. Chapman*, 1 *Peters' C. C. R.* 404.

61. When the debt has been contracted and made payable out of the State, the Circuit Court will not discharge on common bail, a defendant arrested for such debt, notwithstanding his discharge by the insolvent laws of the State in which such action is brought. *Campbell et al. v. Claudius*, 1 *Peters' C. C. R.* 484.

62. Where money had been paid by an order of the District Court, under an erroneous construction of an act of Congress, before a final order of the Circuit Court, in which the suit for the same was pending, the Circuit Court granted a rule on the person who had received the money to return it. *The Ariadne*, 1 *Peters' C. C. R.* 455.

63. At an early period after the organization of the Federal Courts, the rules of practice, in force in the State Courts, which were similar to the English practice, were adopted by the judges of the circuit. A subsequent change in the practice of the State Courts, will not authorize a departure from the rules so adopted in the Circuit Court. 1 *Peters' C. C. R.* 1.

64. If evidence has been given on the trial, that the value of the land in dispute exceeds five hundred dollars, although the jury in their verdict did not find that fact, the Court will not grant a new trial; evidence after verdict, by witnesses on affidavit, would be sufficient to fix the jurisdiction of the Circuit Court. *Den v. Wright et al.* 1 *Peters' C. C. R.* 65.

65. The Circuit Courts are not inferior in the technical sense of the books, but are so only as subordinate to the Supreme Court. But their jurisdiction is special and limited. *Livingston v. Van Ingen*, 1 *Paine*, 45.

66. If jurisdiction of "cases arising under the laws of the United States" be not conferred on the Circuit Courts by an act of Congress, they cannot take cognizance of them. *Id.*

67. The Circuit Courts have jurisdiction of matters arising under the bankrupt law, as they have of any other subject, where the constitution and laws of the United States give them jurisdiction. *Lucas v. Morris*, 1 *Paine*, 396.

68. The Circuit Courts are not deprived of their jurisdiction when it arises from the citizenship or alienage of parties, by the joining of a mere nominal party, who does not possess the requisite character. *Ward v. Arredondo*, 1 *Paine*, 410.

69. But where, in equity, a decree against such party is essential to the relief sought, he is not a mere nominal party. *Id.*

70. In an action of covenant, upon an agreement under seal, containing a penalty amounting to less than five hundred dollars, the Circuit Court has jurisdiction, the action being for damages exceeding five hundred dollars, as laid in the declaration. *Martin v. Taylor*, 1 *Wash. C. C. R.* 1.

71. A suit on a policy of insurance is properly brought, if instituted in the name of the owner of the property intended to be insured; and if the assured is a citizen of another State, the Circuit Court has jurisdiction; although the agent, whose name only appears in the policy, is a citizen of the State of Pennsylvania. *Ruan v. Gardner*, 1 *Wash. C. C. R.* 145.

72. The lessor of the plaintiff, a resident in New-York, as a member of the Population Company, was entitled to 165, out of 2500 shares of a large body of lands in Pennsylvania; the legal title to which was originally in three trustees, who, before the institution of the suit, conveyed the land, the object of the suit, to him, with other tracts, by lease, for six years; subject to an annual rent, and to a covenant by the lessor, to bring suits to recover the land, and at the end of the term, to deliver it up to the trustees. *Held*, that the title of the lessor of the plaintiff, was sufficient to give the Circuit Court jurisdiction of the case. *Browne v. Browne*, 1 *Wash. C. C. R.* 429.

73. The lessor of the plaintiff had an equitable estate in the land, before the conveyance by the trustees; and the Court could have compelled them to convey the legal estate to him, in which case he could have maintained a suit in the Circuit Court. The conveyance of the trustees, having been voluntary, does not impair the jurisdiction. *Id.*

74. A tenant in common, who is a citizen of another State, may sue in the Circuit Court for his portion, although his co-tenants, who are citizens of the State where the lands are, cannot maintain such a trial. *Id.*

75. If the plaintiff has a right to claim the jurisdiction of the Circuit Court under the law, a deed which is not intended to give, and which does not give jurisdiction to the Court, cannot be said to be given in fraud of the law, merely because it changes the nature of the suit, which the plaintiff has a right to maintain in the Courts of the United States. *Browne v. Arbuckle*, 1 *Wash. C. C. R.* 482.

76. The agreement of a State Court to consider a petition for the removal of a cause to the Circuit Court as filed of a term preceding that at which it was actually filed, will not give the Circuit Court jurisdiction of the cause. *Gibson v. Johnson*. 1 *Peters' C. C. R.* 44.

77. A citizen of the District of Columbia is not entitled to sue in the Circuit Courts of the United States. *Westcott's Lessee v. The Inhabitants, &c.* 1 *Peters' C. C. R.* 45.

78. If a cause be removed from a State Court by the defendant, and the plaintiff declares in the Circuit Court of the United States for more than 500 dollars, the plaintiff cannot by a release of part of his debt, so as to reduce it below 500 dollars, take away the jurisdiction of the Circuit Court. *Wright v. Wells*, 1 *Peters' C. C. R.* 220.

COURTS OF THE UNITED STATES IV.

District Courts.

79. The District Court of the district where the seizure was made, and not where the offence was committed, has jurisdiction of proceedings *in rem*, for an alleged forfeiture. *The Merino et al.* 9 *Wheat.* 391. 402.

80. If the seizure is made on the high seas, or within the territory of a foreign power, the jurisdiction is conferred on the Court of the district where the property is carried and proceeded against. *Id.* 402.

81. A municipal seizure, within the territory of a foreign power, does not oust the jurisdiction of the District Court into whose district the property is brought for adjudication. *Id.* 402, 403.

82. The lien for duties, under the impost laws, cannot, in any case, be enforced by a libel of information in the Admiralty; the revenue jurisdiction of the District Courts, proceeding *in rem*, only extending to cases of seizures for forfeitures under laws of impost, navigation, or trade of the United States. *United States v. 350 Chests of Tea*, 12 *Wheat.* 486.

83. But a suit at common law may be instituted in the District or Circuit Courts, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or to recover damages for the illegal taking or detaining the same. *Id.*

84. An injunction, issued by order of the District Judge, expires at the next term of the Court, unless continued by the Court; but the denial of several successive motions to dissolve this injunction may, under circumstances, be considered as equivalent to an order for renewing it. *Parker v. Judges of the Circuit Court of Maryland*, 12 *Wheat.* 564.

85. A District Court of the United States, performing the appropriate duty of a District Court, is not sitting as a Circuit Court, because it possesses the powers of a Circuit Court also. *Southwick et al. v. The Postmaster-General*, 2 *Peters*, 442.

86. The District Court, by virtue of its general admiralty jurisdiction, may deliver property on bail, and render summary judgment on the bail-bond. *The Alligator*, 1 *Gallis.* 145.

87. The District Court has no authority, after an appeal, to bail or sell the property. *The Grotius*, 1 *Gallis.* 503.

88. The Admiralty has jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and whatever may be the form of the stipulations. The Admiralty has also jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbours within the ebb and flow of the tide. The like causes are within the jurisdiction of the District Courts of the United States, by virtue of the delegation of authority "in all civil causes of Admiralty and maritime jurisdiction." *De Lovio v. Boit et al.* 2 *Gallis.* 398.

89. A policy of insurance is a maritime contract, and as such is within the jurisdiction of the District Courts of the United States, acting as Courts of Admiralty. *Id.*

90. The District Court, as a Court of Admiralty and maritime jurisdiction, may entertain suits for all torts, damages, and unlawful seizures at sea: and as a Court of revenue, it may enter suits for the trial of property seized for violation of municipal laws; and, as incident to this jurisdiction, may compel a re-delivery of the property, and award damages for any loss of or injury to it. It may compel a seisor to proceed to adjudication, in the same manner as it does a captor. After process served in proceedings *in rem*, the thing is deemed in the custody of the Court, though in the actual possession of the collector, under the act of 1799. *Burke v. Trevitt*, 1 *Mason*, 96.

91. When a seizure is made within the limits of a judicial district, the District Court of that district has exclusive original cognizance thereof. And if brought

into another district, the Court will remit the property to the proper district. But the cognizance of seizures on the high seas belongs to any District Court into which the property is brought. *The Abby*, 1 *Mason*, 360.

92. An appeal from a decree of the District Court must be taken in open Court, before the adjournment *sine die*, unless a different period be prescribed by the Court. *Norton v. Rich*, 3 *Mason*, 443.

93. In suits for assaults and batteries on the high seas, no appeal can be sustained from a decree of the District Court, unless there be an *ad damnum* laid in the libel exceeding fifty dollars. *Jenks v. Lewis*, 3 *Mason*, 503.

94. The District Courts, as Courts of Admiralty having jurisdiction of seizures, have also jurisdiction of the question, who are entitled to the proceeds as informers, or otherwise. *Robinson v. Hook*, 4 *Mason*, 139.

95. The principal jurisdiction of the seizure being *exclusive*, the question, who is informer, is, it should seem, *exclusive* also. *Id.*

96. But where the fact, that the party is informer, is not in controversy, a Court of Common Law or Equity may sustain a suit for an account and distribution of the informer's share. *Id.*

97. The jurisdiction of the District Courts derived from that clause in the judiciary act declaring that they shall have "exclusive original cognizance of all civil causes of Admiralty and maritime jurisdiction," &c. does not extend to cases of libel for seizures made in another district from that where the proceedings are instituted. But the District Court of the district where the seizure is made has exclusive jurisdiction. *The brig Little Ann*, 1 *Paine*, 40.

98. The District Courts possessing all the powers of Courts of Admiralty, whether considered as instance or prize Courts, have jurisdiction of all cases of marine trespass or tort. *The Amiable Nancy*, 1 *Paine*, 111.

99. The District Courts have not, like the Chancellor in England, exclusive jurisdiction over the entire execution of the bankrupt law. They cannot remove the assignees, nor compel them to account. *Lucas v. Morris*, 1 *Paine*, 396.

100. The District Courts have a general Admiralty jurisdiction in suits by material men *in rem*. In cases of foreign ships, or ships of another state, the maritime law gives the lien. But in cases of domestic ships, no lien is implied; but if the local law gives a lien, it may be enforced in the District Court. *The ship Robert Fulton*, 1 *Paine*, 620.

101. When the District Courts and State Courts have a concurrent jurisdiction *in rem*, the right to maintain the jurisdiction attaches to that tribunal which first exercises it, and takes possession of the thing. *Id.*

102. The District Judges of the Courts of the United States have no authority to issue writs of *ne exeat*. *Gernon v. Bocaline*, 2 *Wash. C. C. R.* 130.

103. The Circuit and District Courts of the United States cannot, either in suits at common law or equity, send their process into another district; except where specially authorized so to do, by some act of Congress. *Ex parte Graham*, 3 *Wash. C. C. R.* 456.

104. The District Court must be governed in its decisions by the maritime code we possessed previous to the revolution, as well as by the particular laws since established by our own government. *The Catharine*, 1 *Adm. Decis.* 104.

105. If a final decree of the District Court be not appealed from, no appeal lies upon any subsequent proceedings, upon the summary judgment rendered on a bond for the appraised value, or upon an Admiralty stipulation taken in the cause to enforce the decree. The proceedings in such cases, and the awarding of execution, are incidents exclusively belonging to the Court in possession of the principal cause. *The brig Hollen*, 1 *Mason*, 431.

106. Forgeries under the laws of the United States must be tried in the district where the crime is committed. *United States v. Britton*, 2 *Mason*, 464.

DEED.

- I. *Description of the land granted.*
- II. *Alterations in a deed.*
- III. *Construction and effect of covenants.*
- IV. *Registry of deeds.*
- V. *Other matters.*

DEED I.

Description of the land granted.

1. A deed of land, bounding the land "beginning at a stake and stones on the west bank of Penobscot river near a thorn-bush, marked on four sides, &c. &c. : thence to a stake and stones on the same bank of said river ; thence running on the western bank of said river to high-water mark to the first mentioned bounds," conveys the land only to the high-water mark on the bank of such river, and does not include the flats below. The owner takes the bank as it is, and may continue to be, by alluvion or decrease by the flow of the river. *Dunlap v. Stetson*, 4 *Mason*, 349.

2. The grant, by the proprietors of land, to a town, of all the proprietors' ways, called highways, conveys only such ways as are in existence at that time, and not such as the proprietors reserved a right to lay out, but never laid out. *Borden v. Manchester*, 4 *Mason*, 112.

3. Where in a deed the lands sold are said to contain "about so many acres more or less," the words "more or less" are intended to cover a reasonable excess or deficit. If the difference between the real and the represented quantity be very great, it would be the duty of a Court of Equity to correct the mistake. *Id.*

4. The proprietor of adjoining lands, who is also owner of the bed of the creek, may grant and convey the bed of the creek, separate from the lands which bound it. *Lessee of Hartshorn v. Wright et al.* 1 *Peters' C. C. R.* 64.

5. Where a committee of proprietors were authorized to lay out a highway ; and they laid it out by a proper description to a certain point, and directed that it should run from thence "as it may be found the most convenient way" to another point, the highway is not legally laid out beyond the first point for want of certainty. When a highway is laid out, it must have a certainty of limits and direction. *Hicks v. Fish*, 4 *Mason*, 310.

6. Where the quantity of a tract of land is given as well as the metes and bounds, the latter will control the location, although they contain less than the given quantity, if they can be ascertained with certainty. *Jackson v. Sprague*, 1 *Paine*, 494.

7. And this rule applies in all cases, whether the lands have been surveyed or not. *Id.*

8. As where land was granted to be run upon a given base, which had never been surveyed, but could be ascertained from a known point, and parallel lines were to be run from each extremity of the base, until a certain quantity was obtained, but a portion of the base had been cut off by a prior grant so as to narrow the extent between the parallel lines ; it was held that the lines could not be continued, in order to make up the deficiency out of the lands of the grantor, beyond the limits which they would have reached, to make up the quantity, if the base had remained undiminished. *Id.*

9. Where the different parts of a description of the metes and bounds are repugnant and contradictory to each other, such parts are to be rejected, and such retained as will leave enough plainly and clearly to designate the land intended to be conveyed. *Id.*

DEED II.

Alterations in a deed.

10. Whether erasures and alterations in a deed are material or not, is a question of law to be decided by the Court. *Steele's Lessee v. Spencer*, 1 *Peters*, 560.

11. The construction of deeds is the province of the Court, and the materiality of an alteration in a deed is a question of construction. *Id.* 561.

12. A deed is not avoided by the seal's being torn off fraudulently or innocently by the obligor, but may be declared on as a subsisting deed. *Cutts v. United States*. 1 *Gallis*. 69.

13. An erasure in a deed, not shown to have been made before it was executed, is sufficient to avoid it upon the plea of *non est factum*. The presumption in such a case is that the erasure was made after the execution of the deed; and the same presumption arises in reference to a settled account, in which an erasure or alteration has been made. *Prevost v. Gratz et al.* 1 *Peters' C. C. R.* 364.

DEED III.

Construction and effect of covenants.

14. The doctrine of estoppel, or the principle of legal policy, which forbids a party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, especially where the latter has not received possession from the former. *Blight's Lessee v. Rochester*, 7 *Wheat*. 535. 547.

15. Although the *Church Wardens* of a parish are not capable of holding lands, and a deed to them and their successors in office, for ever, cannot operate by way of grant; yet, where it contains a covenant of general warranty, binding the grantors and their heirs for ever, it may operate by way of estoppel, to confirm to the church and its privies the perpetual and beneficial estate in the land. *Mason v. Muncaster*, 9 *Wheat*. 445. 455.

16. A covenant by an executor that the premises sold, were *in due form of law*, extended upon and taken in execution to satisfy a debt due to the testator, and that all the forms relating to the setting off, &c. have been complied with, is a covenant for the regularity of the proceedings only, and not for the validity of the title. *Thayer v. Wendell*, 1 *Gallis*. 37.

17. If the terms of a covenant by creditors, to indemnify the debtor against claims under them, are general, it will be construed a several covenant by each creditor, and not a joint one by all. *Halsey v. Whitney*, 4 *Mason*, 206.

18. A deed for lands, out of the possession of the grantor at the time of the execution of the deed, does not convey the lands; and a covenant of seizin in the deed, is not broken, as to the lands which were then out of the possession of the grantor. *Thomas v. Perry*, 1 *Peters' C. C. R.* 49.

19. In deeds where the seizin forms no part of the description of the lands granted, a covenant of seizin applies to the present seizin as well as to the title. *Id.*

20. The freehold estate which vests in a re-lessee, under deed of lease and re-lease, by enlargement, is an estate at common law, which did not require the aid of the statute of uses to execute the possession to the use. *Hurst v. McNeil*, 1 *Wash. C. C. R.* 70.

21. The mere calling a deed of trust, mentioned in the recital of other deeds, a *deed of trust*, does not render it so. *Id.*

22. A deed to A, in consideration of a sum of money paid, or secured to be paid, in the usual form of a deed of bargain and sale, is to be considered as a conveyance

executed; notwithstanding a covenant by the grantor "to make a patent," which can only mean, to obtain one, and deliver it to the grantee. *Willis v. Bucher*, 3 Wash. C. C. R. 369.

23. A conveyance "to J. M. and his generation, to endure as long as the waters of the Delaware should run," passes no more than a life estate. *Foster v. Joice*, 3 Wash. C. C. R. 498.

DEED IV.

Registry of deeds.

24. A deed, acknowledged before a judge of the Supreme Court, and recorded in one county, may not require to be recorded in every county in which the lands conveyed by it, were supposed to be situated. *Lessee of Delancey v. McKeen*, 1 Wash. C. C. R. 254.

25. The title under a sheriff's deed, although the deed was not recorded until after ejectment brought, is good, because, although such deeds do not convey a title until recorded, yet the title relates back to the time when the deed was made. *Wallace v. Lawrence*, 1 Wash. C. C. R. 503.

DEED V.

Other matters.

26. In an action on the case for waste, committed by the defendant while tenant of the plaintiff, to his reversionary interest, by pulling down and removing from the demised premises a dwelling-house erected thereon, and attached to the freehold, the question was raised, what fixtures erected by the tenant during his term are removable by him.

The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was inflexible and without exceptions. It was construed most strictly between executor and heir in favour of the latter; more liberally between tenant for life or in tail and remainder man or reversioner, in favour of the former: and with much greater latitude between landlord and tenant, in favour of the tenant. But an exception of a much broader cast is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. *Van Ness v. Pacard*, 2 Peters, 137.

27. The question whether fixtures erected for the purposes of trade are or are not removable by the tenant, does not depend upon the form or size of the building; whether it has a brick foundation or not; or is one or two stories high; or has a brick or other chimney. The sole question is, whether it is designed for the purposes of trade or not. *Id.*

28. If the house were built principally for a dwelling-house for the family, independently of carrying on trade, then it would doubtless be deemed a fixture falling under the general rule, and irremovable. But if the residence of the family were merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. *Id.*

29. Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of this custom, and to contract with a tacit reference to it. *Id.*

30. The presumption is in favour of the validity of every grant issued in the forms prescribed by law ; and it is incumbent on him who controverts it to support his objections. The whole burthen of proof lies on him. But if his objections depend on facts, those facts must be submitted to a jury. If opposing testimony be produced, that testimony also must be laid before the jury ; and the Court may declare the law upon the fact, but cannot declare it on the testimony. *Patterson v. Jenks et al.* 2 *Peters*, 217.

31. In the nature of things, no reason can be assigned why the grant of the land in controversy should not be good for land which it might lawfully pass ; and void as to that part of the tract for the granting of which the office had not been open. It is every day's practice to make grants for lands which have in part been granted to others. It has never been suggested that the whole grant is void, because a part of the land was not grantable. *Id.*

32. A title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773 and 1775, cannot be recognised in the Courts of the United States. *Johnson v. McIntosh*, 8 *Wheat.* 543.

33. The parties to a deed are estopped to deny the consideration stated in it. But it seems another auxiliary consideration may be proved. *Powell v. Monson and Brimfield Manufac. Co.* 3 *Mason*, 347.

34. A delivery of a deed may be inferred from circumstances, and need not be proved by positive testimony. *Gardner v. Collins*, 3 *Mason*, 398.

35. A purchaser has not by law constructive notice of all matters of record, but only of such as the title deeds of the estate refer to, or put him upon inquiry for. *Dexter v. Harris*, 2 *Mason*, 531.

36. A release to a purchaser at a marshal's sale by the judgment debtor, who holds the estate under two titles, one by mortgage and the other by a distinct conveyance, conveys both titles to the purchaser. *Id.*

37. A deed for land, made under a power of attorney *acknowledged* before a mayor or other chief magistrate of a city, instead of being *proved* before him by the witnesses, and certified by him under the public seal, is evidence under the common law of Pennsylvania, notwithstanding the act of 1705. *Miligan v. Dixon et al.* 1 *Peters' C. C. R.* 433.

38. A warrant for land is, according to long and uniform practice, dated on the day the application is made for the land, although it is retained in the office until the purchase money is paid ; when, and not before, it issues to the party. *Lessee of Brown v. Galloway*, 1 *Peters' C. C. R.* 291.

39. The date of the warrant, and not that of the payment of the purchase money, is the period from which the two years, allowed for the settlement of lands in the new purchase, are to run. *Id.*

40. The courses and distances laid down in a survey, especially if it be ancient, are never in practice considered conclusive, but are liable to be materially changed by oral proof, or by other evidence tending to prove that the documentary lines are not there actually run. *Cann et al. v. Penn et al.* 1 *Peters' C. C. R.* 496.

41. Reputed boundaries are often proved by the testimony of aged witnesses, and the hear-say evidence of such witnesses has been admitted to establish the real lines, in opposition to the calls of an ancient patent. *Id.*

42. It has always been customary in Pennsylvania, to include in surveys made under grants from the proprietors, a greater quantity of land than the warrant specified, and to pay for the excess at the same rate as the original quantity was paid for. This custom did not extend to grants of lands within the proprietary manors. *Id.*

43. A mark with ink acknowledged by the maker of a deed to be his *seal*, is sufficient to create a specialty, though no wax, wafer, or other similar substance be used. *United States v. Ebenezer Coffin, Bee*, 140.

DESCENT.

1. Construction of the statute of descents of Rhode Island of 1822. *Gardner v. Collins et al.* 2 *Peters*, 58.

2. The phrase "of the blood," in the statute, includes the half blood. This is the natural meaning of the word "blood," standing alone, and unexplained by any context. A half brother or sister is of the blood of the intestate; for each of them has some of the blood of a common parent in his or her veins. A person is with the strictest propriety of language affirmed to be of the blood of another, who has any, however small a portion, of the same blood, derived from a common ancestor. In the common law, the word "blood" is used in the same sense. Whenever it is intended to express any qualification, the word whole or half blood is generally used to designate it, or the qualification is implied from the context, or known principles of law. *Id.*

3. A descent from a parent to a child cannot be construed to mean a descent *through* and not *from* a parent. *Id.*

4. It is true that in a sense an estate may be said to come by descent from a remote ancestor to a person upon whom it has devolved, through many intermediate descents. But this, if not loose language, is not that sense which is ordinarily annexed to the terms. When an estate is said to have descended from A to B, the natural and obvious meaning of the words is, that it is an immediate descent from A to B. *Id.*

DEVISE.

1. J. B. devises all his real estate to the testator's son, J. B., jun., and his heirs lawfully begotten; and in case of his death without such issue, he orders A. Y., his executors and administrators, to sell the real estate *within two years after the son's death*; and he bequeaths the proceeds thereof to his *brothers and sisters*, by name, and *their heirs for ever, or such of them as shall be living at the death of the son, to be divided between them in equal proportions, share and share alike*. All the brothers and sisters die, leaving issue. Then A. Y. dies, and afterwards J. B., jun., the son, dies without issue. *Heirs* is a word of limitation; and none of the testator's brothers and sisters being alive at the death of J. B., the devise to them failed to take effect. *Daly v. James*, 8 *Wheat.* 495. 531.

2. *Quære*, Whether a sale by the executors, &c. under such circumstances, is to be considered as valid in a Court of law? *Id.* 535.

3. However this may be, a sale, thus made, after the lapse of two years from the death of J. B., jun., is without authority, and conveys no title. *Id.* 535.

4. *Quære*, Under what circumstances a Court of Equity might relieve, in case the trustee should refuse to exercise the power within the prescribed period, or should exercise the same after that period? *Id.* 536.

5. R. B. being seized of lands in Maryland, made three instruments of writing, each purporting to be his will. The first, dated in 1789, gave his whole estate to his nephew, J. T. M., after certain pecuniary legacies to his other nephews and nieces. In the second will, dated in 1800, the testator gave his whole real estate to J. T. M., during his life; and after his death, to his eldest son, A. in tail, on condition of his changing his name to A. Barnes, with remainder to the heirs of

his nephew, J. T. M., lawfully begotten, for ever, on their changing their surnames to Barnes. The third will, which was executed after the others, and probably in 1803, after some small bequests, proceeded thus: "I give the whole of my property, after complying with that I have mentioned, to the male heirs of my nephew, J. T. M., *lawfully begotten, for ever*, agreeably to the law of England, which was the law of our State before the revolution, that is, the oldest male heir to take all, on the following terms: that *the name of the one that may have the right*, at the age of twenty-one, with his consent, be changed to A. Barnes, by an act of public authority of the State, without any name added, together with his taking an oath, before he has possession, before a magistrate of St. Marys county, and have it recorded in the office of the Clerk of the county, that he will not make any change, during his life, in this my will, relative to my real property. And on his refusing to comply with the abovementioned terms, to the next male heir, on the abovementioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the same terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say, not exceeding twelve months, *if in that time it can be done*, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms abovementioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the abovementioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the abovementioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the abovementioned terms; and on their refusal, to the male heirs of my niece, Mrs. C., lawfully begotten, on their complying with the abovementioned terms; and on their refusal, to the daughter of my nephew, J. T. M., named Mary, so on to any daughter he may have or has." The testator then appoints J. T. M. his sole executor, with a salary of 1600 dollars per annum, for his life, and adds, "and my will is that he shall keep the whole of my property in his possession, during his life." He then empowers the executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses and build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which to be the property of the person that may have a right to it, as abovementioned." *Held*, that the conditions annexed to the estate, devised to the oldest male heir of J. T. M., were *subsequent* and not *precedent*, and that, consequently, the contingency on which the devise was to take effect, was not too remote, the estate vesting on the death of J. T. M.; to be devested, on the non-performance of the condition. *Taylor v. Mason*, 9 *Wheat*. 325.

6. *Quære*, Whether J. T. M. took an estate tail? *Id.* 353.

7. *Quære*, Whether the last will revoked those which preceded it? *Id.* 353.

8. J. P., by his last will, after certain pecuniary legacies, devised as follows: "Item, I give and bequeath unto my loving wife M., all *the rest of my lands and tenements whatsoever*, whereof I shall die seized in possession, reversion, or remainder, *provided she has no lawful issue*. Item, I give and bequeath unto M., my beloved wife, whom I likewise constitute, make, and ordain, my sole executrix of this my last will and testament, *all and singular my lands, messuages, and testaments, by her freely to be possessed and enjoyed*," &c. "and I make my loving friend, H. J., executor of this my will, to take care and see the same performed, according to my true intent and meaning," &c. The testator died seized without issue, and, after the death of the testator, his wife M. married one G. W., by whom she had lawful issue. *Held*, that she took an estate for life only under the will of her husband, J. P. *Wright v. Denn*, 10 *Wheat*. 204, 225.

9. Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. *Id.* 227, 228.

10. Where words are used by a testator, which are insensible in the place where they occur, or their ordinary meaning is deserted, and no other is furnished by the will, they must be entirely disregarded. *Id.* 239.

11. An introductory clause, showing an intention to dispose of the whole of the testator's estate, will not attach itself to a subsequent devising clause, so as to enlarge the latter to a fee. *Id.* 228.

12. The word "tenements" does not carry a fee independent of other circumstances. *Id.* 238.

13. Devise of the testator's estate, "one fourth part to be given to the families of G. Holloway, W. B. Blackburn, and A. Bartlett, to those of their children that my wife shall think proper, but in a greater proportion to F. P. Holloway than to any other of G. Holloway's children; to E. Bartlett in a greater proportion than any of A. Bartlett's children. The balance to be given to the families of C. and J. T. Griffin's children, in equal proportion." *Held*, that the children of C. and J. T. Griffin took *per stirpes*, and not *per capita*, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family. *Walker v. Griffin's heirs*, 11 *Wheat.* 375.

14. E. being seized of lands in the State of New-York, devised the same, by his last will and testament, to his son Joseph, in fee, and other lands to his son Medcef, in fee, and added; "It is my will, and I do order and appoint, that if either of my said sons *should depart this life without lawful issue, his share or part shall go to the survivor*; and in case of both of their deaths, without lawful issue, then I give all the property to my brother, John E. and my sister, Hannah J., and their heirs." Joseph, one of the sons, died without lawful issue, in 1812, leaving his brother Medcef surviving, who afterwards died without issue: *Held*, that Joseph took an estate in fee, defeasible in the event of his dying without issue in the life-time of his brother; that the limitation over was good as an executory devise; and on the death of Joseph, vested in his surviving brother Medcef. *Jackson v. Chew*, 12 *Wheat.* 153.

15. This Court adopts the local law of real property, as ascertained by the decisions of the State Courts, whether those decisions are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State. *Id.* 162.

16. The Court, therefore, considered it unnecessary to examine the question arising upon the above devise, as a question of general law: or to review, and attempt to reconcile the cases in the English Courts upon similar clauses in wills, the construction of this clause having been long settled by a uniform series of adjudications in New-York, and having become a fixed rule of property in that State. *Id.* 161, 162.

17. A devise in the following words: "I give and devise to my beloved son, E. W. G., two third parts of that my *Ferry Farm*, so called," &c. "to him, the said E. W. G., and to his heirs and assigns for ever, he, my said son E. W. G., paying all my just debts out of said estate. And I do hereby order, and it is my will, that my son E. W. G., shall pay all my just debts out of the estate herein given to him as aforesaid," creates a charge upon the estate in the hands of the devisee. *Potter v. Gardner*, 12 *Wheat.* 498. 501.

18. A *bona fide* purchaser, who pays the purchase money to a person authorized to sell, is not bound to look to its application, whether in the case of lands charged in the hands of an heir or devisee with the payment of debts, or lands devised to a trustee for the payment of debts. *Id.* 502.

19. But if the money be misapplied by the devisee or trustee, with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied. *Id.* 502.

20. An absolute bequest of certain slaves to P. H. is qualified by a subsequent limitation over, that if either of the testator's grand-children, P. H., or J. D. A., *should die without a lawful heir of their bodies; that the other should heir his estate*, which converted the previous estate into an estate tail; and there being no words in the will which restrained the dying without issue to the time of the death of the legatee, the limitation over was held to be a contingency too remote. *Williamson v. Daniel*, 12 *Wheat.* 568.

the purpose of the power, the execution is good, and the excess is void. *Warner and Wife v. Howell and Wife*, 3 Wash. C. C. R. 12.

39. *Aliter*, if the boundaries between the excess and the execution are not distinguishable. *Id.*

40. A devise to A, and if he die without heir or issue, the estate to go to B, his brother; gives an estate tail to A by implication. *Willis v. Bucher*, 3 Wash. C. C. R. 369.

41. Certain expressions in a will, showing an intention to dispose of his whole estate, may often enlarge an estate, which would otherwise be for life only, into a fee. But if real estate be given, expressly for life, or in tail, either expressly, or by a clear implication; there are no instances where such estates have been converted into a fee simple, by words of doubtful import, used in either. *Id.*

42. Issue *devisavit vel non*.

The proceedings of the Orphans' Court, upon the offer of a will for probate as to personal property, and the decree of the Prerogative Court refusing the probate, is not evidence upon this issue; and if the one party read part of a deposition, to show that a witness had contradicted himself, the other side may read the whole, to prove his consistency. *Harrison v. Rowan*, 3 Wash. C. C. R. 580.

43. It is not necessary for the devisee to prove, that the will was read to the testator in the presence of the witnesses. In general this is to be presumed. *Id.*

44. A man may be capable of disposing by will, and yet incapable to make a contract, or manage his estate. The question is as to competency when the will was made, though evidence of acts and sayings before is always admitted. *Id.*

45. Where an issue of "*devisavit vel non*" is directed out of Chancery in England, the practice is, for the Judge who tried the cause to return, with the verdict, his notes; and if the Chancellor is dissatisfied, on the ground of the admission of improper evidence, or the rejection of what was proper, or for other reasons, he will direct a new trial; but no exception can be taken at *Nisi Prius*, to the opinion of the Judge who tried the cause. In the Circuit Courts of the United States, if the Court is supposed to have erred in any of those particulars, the proper mode is to move the Court, sitting in equity, for a new trial. *Id.*

DOWER.

1. A bill in equity lies for dower. A deed of land executed by husband and wife, but containing no words of grant by the wife, does not convey her estate in the land, nor her dower. *Powell v. Monson and Brimfield Manufac. Co.* 3 Masson, 347.

2. Dower is to be according to an increase of value not arising from the improvements of the purchaser, but from the general growth of the country, or other general causes. *Id.*

3. A release of dower, executed by the wife *alone*, long after the conveyance of the land by her husband, and for a new consideration, is not, in *Massachusetts*, an extinguishment of the dower. *Semble*, that an implied or express assent of the husband to the release, without joining in the deed, is not sufficient to give the release effect. *Id.*

4. The main mill-wheel and gearing of a factory, attached to the factory and necessary for its operation, are fixtures and real estate, to which the right of dower attaches. *Id.*

5. Dower is assignable of real estate, mortgaged by the husband after the marriage, without the wife's joining in the deed, and subsequently aliened by him, but in the meantime improvements made thereon by him, according to the value at the time of alienation, including the improvements. A mortgage is not an alienation so as to preclude dower from attaching to such improvements. *Id.*

EJECTMENT.

1. Possession of land by a party, claiming it as his own in fee, is *prima facie* evidence of his ownership and seisin of the inheritance. *Ricard v. Williams*, 7 *Wheat.* 59. 105.

2. But possession alone, unexplained by collateral circumstances, which show quality and extent of the interest claimed, evidences no more than the mere fact of present occupation by right. *Id.* 105.

3. But if the party be in under title, and by mistake of law supposes himself possessed of a less estate than really belongs to him, the law will remit him to his full right and title. *Id.* 106.

4. It is a general rule that a disseisor cannot qualify his own wrong, but must be considered as a disseisor in fee. *Id.* 107.

5. But this rule is introduced only for the benefit of the disseisee, for the sake of electing his remedy. *Id.*

6. And it must also appear that the party found in possession entered without right; for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right. *Id.*

7. An action for mesne profits may be maintained by the landlord in fact, who is in possession of the land by means of his tenants, and by his acts, commands, or co-operation, aids in withholding the possession from the plaintiff. *Chirac v. Reinicker*, 11 *Wheat.* 280. 297.

8. One tenant in common may disseise another, and if a person enter into possession, claiming title to the entirety under a deed, and the title turns out to be defective as to a moiety, it is a disseisin of the parties entitled to that moiety. *Prescott v. Nevers*, 4 *Mason*, 326.

9. Where a person enters into possession under a recorded deed claiming title to the entirety, and exercises acts of ownership, it is a disseisin of all persons who claim title to the same land to the extent of the boundaries in the deed. *Id.*

10. Where the commonwealth is seized under an inquest of office of lands, the seisin must be deemed to continue, until the title is lawfully parted with; for the commonwealth cannot be disseised. A resolve of the legislature, releasing such title to another, may be construed as a grant if necessary to give it effect. *Stokes v. Dawes*, 4 *Mason*, 268.

11. When the term of the plaintiff in ejectment expires before the trial, although possession of the property cannot be recovered, yet he may proceed for damages, for the trespass, and for the mesne profits. *Lessee of Brown v. Galloway*, 1 *Peters' C. C. R.* 291.

12. In an action for mesne profits, the confession of entry by the defendant in the ejectment, is sufficient evidence to enable the plaintiff to recover damages, and mesne profits; *aliter*, when the judgment in the ejectment was obtained by default. *Id.*

13. To a *scire facias* to revive a judgment in ejectment for the term and damages, the defendant cannot plead a conveyance of the premises by the lessor of the plaintiff, subsequent to the judgment. *Lessee of Penn v. Klyne et al.* 1 *Peters' C. C. R.* 446.

14. After a conveyance to a third person of the land which has been recovered in an ejectment, a *scire facias* and a *habere facias* must issue in the name of the plaintiff in the original judgment. *Id.*

15. Where the lessor of the plaintiff dies after judgment in ejectment, the execution may issue in the name of the lessee without the necessity of a *scire facias*. *Id.*

16. A warrant, survey, and payment of the purchase money, are sufficient to give a legal title of entry in ejectment. *Lessee of Willink v. Miles*, 1 *Peters' C. C. R.* 429.

17. The plaintiff in an action of ejectment may recover *mesne profits*, on giving notice to the defendant that he means to proceed for them. *Lessee of Battin v. Bigelow*, 1 *Peters' C. C. R.* 452.

18. It is not necessary to produce the deed poll, from the person in whose name the application was made for a tract of land, in order to support the title of the plaintiff in an ejectment for the land; the plaintiff having obtained the warrant and paid the purchase money. *Lessee of Willink v. Miles*, 1 *Peters' C. C. R.* 429.

19. In ejectment, possession accompanied with a claim of ownership in fee, is *prima facie* evidence of such an estate. In such a case it is not the possession alone, but that it is accompanied with the claim of the fee which gives this effect, by construction of law to the acts of the party. *Jackson v. Porter*, 1 *Paine*, 457.

20. But such effect is limited to the claim actually made, and a claim of a different kind cannot afterwards be set up for the purpose of aiding the first. *Id.*

21. As where one claimed title by an Indian deed, confirmed by an agent of the British government, who could not lawfully have confirmed it; it was held that no other kind of confirmation, and no other deed could be set up to help the possession; and that any presumption of the existence of a deed was to be confined to such an one as was originally asserted. *Id.*

22. The seisin of lands belonging to the Indian tribes is in the sovereign, and the Indians are mere occupants. A purchaser from them can acquire only the Indian title, and they may resume it, and make a different disposition of it. *Id.*

23. Where proclamation had been made by the Governor of the colony of New-York, under orders from the King, that no purchases of lands should be made of the Indians, it was held, that a purchaser could not acquire even the Indian title of occupancy. *Id.*

24. An occupant under an Indian grant, the Indians having afterwards resumed the title, and granted it to the crown, was held to be a tenant at will of the King, whose occupancy no length of time could ripen into a title by adverse possession. *Id.*

25. The circumstance that one took possession of unoccupied land, as contractor, to transport for the government to and from a fort on the frontiers, and that his claim comprehended the fort itself, as well as the land around it, and that his improvements were necessary in the performance of his contract, considered evidence that he did not hold in hostility, but in subordination to the rights of the crown. *Id.*

26. In an ejectment, the plaintiff must show, and it will be sufficient for him to show, a right of entry; or, in other words, a right of possession. *Hyllon's Lessee v. Brown*, 1 *Wash. C. C. R.* 204.

27. If plaintiff proves twenty years possession, or the seisin of his ancestor, and a descent cast, it is a sufficient *prima facie* title; and the defendant can only succeed, by showing a better right in himself, or out of the plaintiff. *Id.*

28. If the plaintiff shows a right of possession in himself, it is sufficient against every other person, but the proprietary, or one claiming under him. *Id.*

29. In an ejectment, the plaintiff, who has shown title in himself, is not bound to show the title to the same land, to be out of the proprietary. *Id.*

30. If a defendant rely upon the original title of the proprietary, he must show it to be a subsisting title, either in the proprietary, or in himself claiming under the proprietary. *Id.*

31. After a judgment in ejectment, and the plaintiff is put into possession, the Court will not in a summary manner restore the defendant to possession, although he pays the rent, for the non-payment of which the ejectment was brought. *Lessee of Camac v. Alwyn*, 1 Wash. C. C. R. 466.

32. After the defendant in ejectment has appeared, and entered into the common rule, he may take a rule on the plaintiff for trial, or *non pros*; although the declaration has not been changed, so as to make it against the real defendant. This is the neglect of the plaintiff, and he cannot take advantage of it. *Hurst v. Ker*, 1 Wash. C. C. R. 189.

33. After a survey has been once regularly made and returned, under the directions of the warrantee, although not in conformity with the terms of the warrant; the warrant is *functus officio*; and cannot afterwards be revived, and a survey made under it. *Harris v. Burchan et al.* 1 Wash. C. C. R. 191.

34. A right by settlement and improvement, if a survey of the land included in it shall be made, under a warrant, by the owner of the settlement and improvement, will be merged in the higher title. But if the surveyor, without the knowledge of the warrantee, makes such use of the warrant, the rights of the warrantee are not thereby affected. *Id.*

35. If the warrant for lands be uncertain, or if it be certain, and is laid in another place, and before the survey is made, no third person has acquired a title to the land on which the warrant is laid, every objection to a title so derived is done away. *Phillips v. Wilson*, 1 Wash. C. C. R. 470.

36. *Quære*, What would be the effect of a settlement upon the title to lands comprehended in another and adjoining survey, where the lines of the land claimed by the settlement had not been run out, so as to take part of the lands so adjoining the settlement? *Id.*

37. An ejectment cannot be maintained on a warrant, without a survey, or purchase money paid. *Vanhorn v. Chesnut*, 2 Wash. C. C. R. 160.

38. The plaintiff claimed under a warrant and survey in 1769; but produced no proof of the payment of the purchase money to the proprietors or to the state. Such a title is not sufficient to recover in ejectment, as it does not give a right of entry. *Milligan v. Dixon et al.* 2 Wash. C. C. R. 258.

39. The plaintiff can recover mesne profits, in the nature of damages, only from the time of the ouster laid in the declaration, having proved no title prior thereto. *Hylton v. Brown*, 2 Wash. C. C. R. 165.

40. A survey made by order of the board of property, merely to mark the boundary of land claimed by the person for whom it is made, and not in execution of a warrant issued for the land, is not such a survey as will give title. *Wells v. Wright*, 3 Wash. C. C. R. 250.

41. When the defendant, in an ejectment, opposes to the plaintiff's title a superior and outstanding title in a third, under whom he does not claim, it must be *subsisting and available*; and on which the asserted owner might recover in ejectment, if he were plaintiff. If such a title is barred by the statute of limitations, or by a descent cast, the defendant cannot avail himself of it, to protect his mere possession; he being a perfect stranger to the title. *Foster v. Joice*, 3 Wash. C. C. R. 498.

42. Ejectment for a tract of land purchased at sheriff's sale, under a *venditioni exponas* against the defendant.

The plaintiff in ejectment must show a legal title to entry in general; and unless under special circumstances, the defendant should be let in, to prove the title an equitable one. *Cooper v. Galbraith*, 3 Wash. C. C. R. 546.

43. No person can recover or defend himself against his own grant or covenant; nor can any one controvert, against his own acts, though not by deed, a title which he has thus acknowledged. *Id.*

44. In an ejectment by a *second mortgagee*, against the mortgagor, the latter cannot set up the title of the first mortgagee. *Id.*

45. In an ejectment by the purchaser at a sheriff's sale, against the defendant in the execution, or those who may claim under him, the plaintiff need not show any

other title than the judgment, execution, and the sheriff's deed ; and this title the defendant cannot controvert. *Id.*

46. The return of the marshal of the service of a declaration in ejectment, stating, that he had shown it to one defendant, and delivered a copy of it at the dwelling-house of the other, in the presence of his wife, is not sufficient ; as a copy should have been left at the dwellings of both defendants, and the notice should have been read or explained by the marshal, and the return should have stated, that the defendants were tenants in possession. If all the defendants in ejectment inhabit the same house, and this appears by the marshal's return, it is sufficient to deliver one copy. *Campbell's Lessee v. Harper*, 3 Wash. C. C. R. 356.

EVIDENCE.

- I. *Attendance of witnesses.*
- II. *Incompetency of witnesses from interest.*
- III. *General rules of evidence.*
- IV. *Verdicts and judgments of Courts of Record.*
- V. *Proof of records and judicial proceedings.*
- VI. *Public writings, not judicial.*
- VII. *Proof of private writings.*
- VIII. *Admissibility of parol evidence to explain, vary, or discharge written instruments.*

EVIDENCE I.

Attendance of witnesses.

1. The deposition of a witness, who resides three hundred miles from Philadelphia, taken *de bene esse*, cannot be read in evidence ; unless the witness was served with a subpoena, and it appears, that from some sufficient reason he cannot attend. *Lessee of Brown v. Galloway*, 1 Peters' C. C. R. 291.

2. A witness whose deposition has been taken *de bene esse*, must be proved to have been served with a subpoena, and to be unable to come ; unless he is so old and generally so infirm, that his attendance could not be expected ; the age of 65 is not of itself sufficient to entitle it to be read. *Banert v. Day*, 3 Wash. C. C. R. 243.

EVIDENCE II.

Incompetency of witnesses from interest.

3. A person having an interest only in the question, and not in the event of the suit, is a competent witness. *Evans v. Eaton*, 7 Wheat. 356. 421.

4. In general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him. *Id.* 424.

5. The affidavit of a party to the cause, offered to establish the loss of an original contract ; in order to let in secondary evidence of its contents, is admissible.

If his own affidavit could not be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a Court of Law. *Taylor v. Riggs*, 1 *Peters*, 596.

6. It is a sound rule that no man can be witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depend on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance, a commission to take his deposition, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On many incidental questions, which are addressed to the Court, and do not affect the issue to be tried by the jury, the affidavit of the party is received. *Id.* 596.

7. The testimony which establishes the loss of a paper is addressed to the Court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove any thing in the cause. *Id.* 597.

8. In an action originally instituted against H. and J., alleging them to be partners in trade, H., who was not found or served with process, was offered as a witness in favour of J., a release having been previously executed and delivered to him by J. In disposing of the objection made to the competency of this evidence, the Court observed: "It is to be premised that the only ground upon which the objection can be rested, is the supposed interest of the witness in the event of the cause; since the suit having regularly abated as to him by the return that he was 'no inhabitant,' he was no more a party to it, than he would have been had his name been altogether omitted in the declaration." As to the objection upon the score of interest, it is sufficient to remark, that it was manifestly hostile to the party in whose favour he testified, and who offered it in evidence; since the plaintiff's recovery against the defendant, and satisfaction from him, would be a bar to their action against the witness; and the release of J. protected him against any action which J. might bring against him for contribution or otherwise. *Le Roy, Bayard & Co. v. Johnson*, 2 *Peters*, 186.

9. One seaman may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the event of the suit. *Spurr v. Pearson*, 1 *Mason*, 104.

10. A co-heir or co-next of kin is not a competent witness for the plaintiff, in a suit brought for an account of a trust fund, created for the benefit of all the heirs, or next of kin. *West v. Randall*, 2 *Mason*, 181.

11. The heirs of a deceased mortgagor are not competent witnesses in a suit in equity by an assignee to redeem, to prove the assignment fraudulent, for that is to establish their own title. *Randall v. Phillips*, 3 *Mason*, 378.

12. The jury being impannelled to try three causes, the plaintiff in one of them gave evidence applicable to a case in which he was not a party, but which affected his own case, to his advantage; the Court granted a new trial in all the cases. *Consequa v. Willings et al.* 1 *Peters' C. C. R.* 225.

13. A plaintiff in a suit who has assigned all his interest in the event of it, may be a witness, the costs of the suit having been paid, or such an amount deposited with the proper officer by the assignee as will discharge the same. *Willings et al. v. Consequa*, 1 *Peters' C. C. R.* 301.

14. The Court will not look, to remote contingencies, in order to disqualify a witness from giving testimony. *Id.*

15. The deposition of a witness on the part of a plaintiff, who had given certificates upon which a recovery was expected to be obtained, and who expected a commission of one per cent. on the amount to be recovered from the defendant, but which certificates were not evidence in the cause, was admitted. *Id.*

16. If a witness is sworn on his *voir dire*, no other evidence to prove him incompetent can be given. But if, in any part of his examination, it should afterwards

appear that the witness was incompetent, his testimony will be set aside by the Court. *Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

17. A release by a party to make him a competent witness in favour of an executor is sufficient, if it releases all claim to the estate of the deceased, although by mistake the executor's name is omitted in the release. *Oliver v. Vernon*, 4 *Mason*, 275.

18. The agent, who makes the insurance, after purging himself on his *voir dire*, is a good witness for the assured, to prove matters respecting the policy. *Ruan v. Gardner*, 1 *Wash. C. C. R.* 145.

19. On an indictment against the master of a vessel, for destroying her at sea, to the injury of the underwriters, the president of the incorporated Insurance Company, by whom the property was assured, although a stockholder, may be a witness to prove the handwriting of the defendant, to the manifest of the cargo; because the conviction of the defendant would not be evidence in a suit on the policy against the company. *United States v. Johns*, 1 *Wash. C. C. R.* 363.

20. In an action for the recovery of a debt, said to be due by the defendant, as the dormant partner of B. and A., a person who is a creditor of the partnership, is not a competent witness to prove the defendant a dormant partner in the firm indebted to him. *Corps v. Robinson*, 2 *Wash. C. C. R.* 383.

21. A person who had been convicted in the Court of Pennsylvania, of an assault and battery with intent to murder, and sentenced to fine and imprisonment, is a competent witness. *United States v. Brockus*, 3 *Wash. C. C. R.* 99.

22. Fine and imprisonment is not an infamous punishment, so as to render the witness incompetent. *Id.*

23. The captain is responsible to the seamen for wages, and therefore not a competent witness in suits for wages by mariners. *The brig Phoenix*, 1 *Peters' Adm. Decis.* 201.

EVIDENCE III.

General rules of evidence.

24. Presumptions of a grant, arising from the lapse of time, are applied to corporeal, as well as incorporeal hereditaments. *Ricard v. Williams*, 7 *Wheat.* 59. 109.

25. They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are perfectly consistent with the non-existence of a grant. *Id.* 109.

26. *A fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant. *Id.* 110.

In general, the presumption of a grant is limited to periods analogous to those of the statute of limitations, in cases where the statute does not apply. *Id.*

27. Where the statute applies, the presumption is not generally resorted to; but if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute. *Id.* 110.

28. Where a deposition has once been read in evidence without opposition, it cannot be afterwards objected to as being irregularly taken. *Evans v. Hellick*, 7 *Wheat.* 453.

29. It is no objection to the competency or credibility of a witness, that he is subject to fits of derangement, if he is sane at the time of giving his testimony. *Id.* 470.

30. The doctrine that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony, ought to be received under many qualifications and with great caution. *The Santissima Trinidad*, 1 *Wheat.* 338.

31. Application of the maxim, *falsus in uno, falsus in omnibus*. *Id.* 339.

32. Evidence that a subscribing witness to a deed had been diligently inquired after, having gone to sea, and been absent for four years, without having been heard

from, is sufficient to let in secondary proof of his handwriting. *Spring v. S. C. Ins. Co.* 8 *Wheat.* 268. 282.

33. No demand of payment, or notice of non-payment by a notary public, is necessary in the case of promissory notes. A protest is (strictly speaking) evidence in the case of foreign bills of exchange only. *Nicholas v. Webb*, 8 *Wheat.* 326. 331.

34. But it is a principle that memorandums made by a person, in the ordinary course of his business, of acts which his duty, in such business, requires him to do for others, are, in case of his death, admissible evidence of acts so done. *A fortiori*, the acts of a public officer are so admissible, though they may not be strictly official, if they are according to general usage, and the ordinary course of his office. *Id.* 334.

35. Therefore the books of a notary public, proved to have been regularly kept, are admissible in evidence, after his decease, to prove a demand of payment, and notice of non-payment, of a promissory note. *Id.* 334.

36. In an action against the receiver, not describing him in his official capacity, evidence may be given of moneys received in his official capacity; and under a count for money had and received, evidence may be given of public stock received by him, where such stock is, by law, made receivable at par, in payment for lands sold by the United States. *Walton v. United States*, 9 *Wheat.* 651.

37. Although it is the province of the Court to construe written instruments, yet, where the effect of such instruments depends not merely on the construction and meaning of the instrument, but upon collateral facts *in pais*, and extrinsic circumstances, the inferences of fact to be drawn from them are left to the jury. *Etting v. Bank of the United States*, 11 *Wheat.* 59. 75.

38. A counsel or attorney is not a competent witness to testify as to facts communicated to either by his client, in the course of the relation subsisting between them, but may be examined as to the mere fact of the existence of that relation. *Chirac v. Reinecker*, 11 *Wheat.* 280. 295.

39. Where the testimony of the seizing officer, in a proceeding *in rem* in the Admiralty, is admitted in the Court below without objection, it cannot be objected to in this Court on appeal. *The Palmyra*, 12 *Wheat.* 1. 18.

40. The rules of evidence as to presumptions in the case of private individuals, are applicable to the acts of corporate bodies. *The Bank of the United States v. Dandridge*, 12 *Wheat.* 64. 69.

41. Cases where corporate acts have been the subject of presumptions. *Id.* 71.

42. Distinction, as to evidence, between an act prescribed by law to be done as a *condition precedent*, as a record, or only *directory* to the officers who are to make the record. *Id.* 81.

43. The *onus probandi*, in criminal cases, lies upon the prosecution, unless there be some positive provision by statute to the contrary. *United States v. Gooding*, 12 *Wheat.* 460. 471.

44. Upon an indictment under the slave trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, testimony of the declarations of the master being a part of the *res gesta*, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner in the conduct of the guilty enterprise, is admissible against the owner. *Id.* 460. 469.

45. Upon such an indictment against the owner, charging him with fitting out the ship, with intent to employ her in the illegal voyage, evidence is admissible that he commanded, authorised, and superintended the fitment through the instrumentality of his agents, without being personally present. *Id.* 471.

46. The cross examination of a witness by the opposite party is a waiver of the irregularity of his deposition. *The Mechanics' Bank of Alexandria v. Maria and Louisa Seton*, 1 *Peters*, 307.

47. Where an agent, to whom the management of a tan-yard was intrusted by the proprietors, instead of a journal of hides received for them from day to day, gave, at considerable intervals, a general certificate of the total amount of hides re-

ceived from the last preceding settlement, up to that time : such certificate is not less binding than one detailing the separate transactions of each day, and may be admitted in evidence to charge the parties, whose agent he was. *Barry v. Foyles*, 1 *Peters*, 316.

48. Where the suit is brought upon a partnership transaction, against one of the partners, and the declaration stated a contract with the partner who is sued and gave no notice that it was made by him with another, evidence of a joint assumpsit will support such a declaration ; and the want of notice has never been considered as justifying an exception to this evidence at the trial. *Id.*

49. The rule of evidence, that in questions of pedigree, the declarations of aged, and deceased members of the family, may be proved, and given in evidence, has not been controverted. *Elliot v. Peirsol et al.* 1 *Peters*, 337.

50. Where the defendant had reserved a right to move the Court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the Court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency unless the whole was incompetent. The Court is not bound to do more than respond to the motion, on the terms on which it was made. Courts of Justice are not obliged to modify the propositions of counsel, so as to make them fit the case. If they do not fit, that is a sufficient ground for their rejection. *Id.* 338.

51. Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gesta*, may be given in evidence against the others. *American Fur Company v. United States*, 2 *Peters*, 359.

52. Evidence to establish heirship and pedigree, had been obtained under a commission issued for that object to France, in an ejectment cause, in which the plaintiffs had recovered the property for which the suit was instituted. In the course of the trial, a bill of exceptions was taken by the plaintiffs, in which the evidence contained in the commission was included. The commission and the testimony obtained under it were afterwards lost. In an action of trespass for mesne profits, brought by the plaintiffs in the ejectment, against the landlord of the defendant in the suit, who had employed counsel to oppose the claims of the plaintiffs, but who was not a party to the suit in the record ; it was held that the testimony, as copied into the bill of exceptions, was admissible evidence to establish pedigree. *Chirac et al. v. Reinecker*, 2 *Peters*, 613.

53. It is well known, that in cases of pedigree, the rules of law have relaxed in respect to evidence, to an extent far beyond what has been applied to other cases. This relaxation is founded on principles of public convenience and necessity. *Id.*

54. When the law presumes the affirmative, the proof of the negative is thrown upon the other side. *United States v. Hayward*, 2 *Gallis*. 498.

55. In what cases the defendant is required to prove the affirmative, although the forms of pleading make it necessary to allege the negative in the indictment or information. *Id.* 498.

56. In an information on the statutes prohibiting importation, &c. qualified by the subsequent statute excepting neutral vessels from their operation, the burthen of proof of the neutrality rests on the claimant. *Id.* 499.

57. *Onus probandi* on the claimants, where a special defence is set up. *The Short Staple*. 1 *Gallis*. 104.

58. Strong presumptive circumstances of fraud will outweigh positive testimony against it. *Id.*

59. The origin of rum may be proved by the taste. *Ten Hhds. of Rum*, 1 *Gallis*. 188.

60. The mere coming into port, without breaking bulk, is *prima facie* evidence of an importation. *The Boston and Cargo*, 1 *Gallis*. 239. *The Mary and Cargo*, 1 *Gallis*. 206.

61. The lawful or unlawfulness of the mode by which evidence is obtained does not affect its admissibility in a Court of law. *U. States v. La Jeune Eugenie*, 2 *Mason*, 409.

62. In an action for a malicious civil prosecution, the advice and opinion of counsel as to their being a good cause of action given *before* the commencement of the suit is admissible evidence; but not if given *afterwards*. *Blunt v. Little*, 3 *Mason*, 102.

63. But such evidence of the advice and opinion of counsel is not evidence, unless it be shown what the statement of facts was, which was laid before them for their advice and opinion. *Id.*

64. If an answer to a bill in equity relies on new facts, by way of discharge or avoidance, or defence, not responsive to the bill, they must be established by independent proofs, the answer is not evidence in support of them. *Randall v. Phillips*, 3 *Mason*, 378.

65. If a party says, on his promissory note's being produced to him, that it is as good as money, this is sufficient evidence to take the same out of the statute of limitations. *Arnold v. Dexter*, 4 *Mason*, 122.

66. In replevin upon the issue of *non cepit*, proof that the defendant took the goods as marshal, is sufficient proof of the caption. *D'Wolf v. Harris*, 4 *Mason*, 515.

67. That there is another part owner is not good evidence, under the plea of property in a third person. *Id.*

68. General character may be given in evidence, where the facts are doubtful, or admit of different interpretations. But where the evidence is positive, and satisfactory to the jury, previous good character cannot overcome the just presumption of guilt arising therefrom. *United States v. Freeman*, 4 *Mason*, 505.

69. Seamen are deemed in law credible as well as competent witnesses, and their testimony is to be weighed like other witnesses. *Id.*

70. What circumstances furnish presumptions of exclusive ownership of furniture, &c. in the wife. *Picquet v. Swan*, 4 *Mason*, 443.

71. Priority of occupancy of the flowing water of a river, creates no right, unless the appropriation be for a period, which the law deems a presumption of right. The exclusive use of flowing water for twenty years is a conclusive presumption of right. *Tyler v. Wilkinson*, 4 *Mason*, 397.

72. Of the nature and effect of presumptions arising from use of water, as to pre-eminence or prior use, in case of a deficiency to supply all concerned. *Id.*

73. A person who came to a knowledge of facts, while he was a student in the office of an attorney who was consulted by a party in this cause, in relation to the matter to which he is called to testify, may be a witness. The rules of law which prohibit an attorney or counsel being witnesses, do not apply to a student in the office of such attorney or counsel. *Andrews et al. v. E. Solomon et al.* 1 *Peters' C. C. R.* 356.

74. The declarations of a party on one day, as explanatory of what was said by him on another day, and which was given in evidence, cannot be shown by testimony. What a party has said one day against his interest, cannot be explained by declarations on a subsequent day. *Blight v. Ashley et al.* 1 *Peters' C. C. R.* 16.

75. Evidence to explain a transaction which had come out from the defendant's testimony, was allowed; and the plaintiffs were suffered, after their testimony in chief was closed, to examine witnesses to repel an argument which might be drawn from the statements of the defendant's witnesses. *Gilpins v. Consequa*, 1 *Peters' C. C. R.* 84. *S. C.* 3 *Wash. C. C. R.* 184.

76. A journal kept by the master of a ship, who was alleged to be insane, was allowed to be read in evidence, to prove his sanity by the style in which it was kept; but not as evidence of any fact stated in it. *United States v. Sharp et al.* 1 *Peters' C. C. R.* 118.

77. The log-book kept by the master is not evidence, in an indictment for a revolt, and confining the master. *Id.*

73. A protest which was not offered, to discredit the testimony of any one who had signed it, and had given testimony, is not evidence. *Id.*

79. The presumption is in favour of mental capacity ; and in order to affect the validity of a decree or will, incapacity must be proved. If general derangement is proved at any time prior to the execution of the deed, the grantee must prove capacity in the grantor. *Lessee of Hoge v. Fisher et al.* 1 *Peters' C. C. R.* 163.

80. The public sales of teas in Holland, by the Asiatic Company, furnish evidence, but not exclusive, of the quality and value of teas disposed of at such sales ; and the average price brought by teas of the *same quality and description*, and not of that brought by *all the teas of the same kind*, furnish this evidence. *Willings et al. v. Consequa*, 1 *Peters' C. C. R.* 172.

81. Declarations of a witness cannot be given in evidence, except only in answer to evidence of other declarations of the witness, inconsistent with what he had previously sworn to. *Lessee of Wright v. Deklyne*, 1 *Peters' C. C. R.* 199.

82. The examinations of the supercargoes of the muster chests, and their letters to the plaintiffs, expressing their satisfaction with the qualities of the teas, are not conclusive evidence of their quality, if in fact the teas were not of the quality represented. *Gilpins v. Consequa*, 1 *Peters' C. C. R.* 35. *S. C.* 3 *Wash. C. C. R.* 184.

83. In an action for a vexatious suit, and malicious holding to bail, the records of other actions brought by the same defendant against the plaintiff, cannot be given in evidence. *Ray v. Law*, 1 *Peters' C. C. R.* 207.

84. When the declaration states that the sum demanded as bail, in a suit, was endorsed on the writ, no other evidence to establish the fact that such sum was demanded as bail, can be given, than the exemplification of the record of the proceedings. *Id.*

85. The Court will not permit the plaintiff to put a question to a witness, called by him to rebut the defendant's testimony, which is not intended to contradict or discredit the defendant's witnesses, and which question is not rendered necessary by evidence given by the defendant. *Oliver Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

86. Although counsel profess that the object of testimony which is offered by them is to discredit one of the witnesses of the opposite party, yet if the Court consider the testimony cannot have that effect, they will not permit it to be given. *Id.*

87. How far the acknowledgment of a prisoner as to crime meditated *to be committed*, may be given in evidence to connect it with the offence for which he is on his trial. *United States v. Tardy*, 1 *Peters' C. C. R.* 458.

88. Evidence to prove a particular course of trade, or other matters in the nature of facts, is proper ; but not to prove what, or how, the law is considered by merchants. *Ruan v. Gardner*, 1 *Wash. C. C. R.* 145

89. It is premature before the jury are sworn, and the trial commenced, for either party to call upon the other to produce a paper which he has received notice to produce on the trial. *Hylton's Lessee v. Brown*, 1 *Wash. C. C. R.* 298.

90. It is sufficient for one party to *suggest* that the other is in possession of a paper, which he has, under the Act of Congress, given him notice to produce at the trial, without offering other proof of the fact ; and the party so called upon must discharge himself of the consequences of not producing it, by affidavit, or other proof, that he has it not in his power to produce it. *Id.*

91. The Court will not, upon a notice of the defendant to the plaintiff, to produce a title paper to the land in dispute, which is merely to defeat the plaintiff's title, compel him to do so ; unless the defendant first shows a title to the land. *Id. Sed vide, for a contrary decision*, *S. C.* 1 *Wash. C. C. R.* 343.

92. The declaration of a person exercising authority, that he possesses it, can never be received as evidence of the fact of his authority. *Lessee of James v. Stookey et al.* 1 *Wash. C. C. R.* 330.

93. If a witness, in a deposition, on his cross-examination, states as facts circumstances not pertinent to the cause, which he has said or sworn in another cause, in which these circumstances were pertinent, the statement cannot be read to discredit

him. *Aliter*, if he has, on a former occasion, said or sworn differently from what he now deposes, in a matter relative to the cause in which his deposition is read. *Lamelere v. Caze*, 1 Wash. C. C. R. 413.

94. The captain's protest may be read to contradict what he states in his examination in this cause, in order to discredit him. *Id.*

95. *It seems*, that depositions sworn to, but not signed by the witness, may be read in evidence. *Ketland v. Bissett*, 1 Wash. C. C. R. 144.

96. Each interrogatory in a commission should be answered separately, at least in substance; and the omission of such answers is fatal to the whole commission; although the witness in answering the general interrogatory, says that he knows nothing further material to either party. *Id.*

97. It is no objection to giving in evidence a bill of lading and invoice, which have been made out after the usual and regular time, if the circumstances under which the vessel and master were, prevented their being made out at the common period. *Graham v. Pennsylvania Ins. Co.* 2 Wash. C. C. R. 113.

98. Where accounts have, on notice from the plaintiff to the defendant to produce them, been delivered to the plaintiff, and retained by him, and without objection, the defendant may insist on their being read on the trial of the cause. *Corps v. Robinson*, 2 Wash. C. C. R. 388.

99. The certificate of the collector of Havana, under the seal of his office, of the arrival of a vessel at that place for water, and that before permission to take it on board was given to the captain, he was obliged to stipulate that the cargo should be landed, the articles composing it being wanted for the use of the place, is not evidence, as the deposition of the collector to these facts should have been taken. *Wood v. Pleasants*, 3 Wash. C. C. R. 201.

100. In an indictment for a libel, character being put in issue, the plaintiff may give evidence of his character, before it is attacked by the defendants. *Romayne v. Duane*, 3 Wash. C. C. R. 246.

101. What a witness (since dead) swore at the former trial of an indictment for aiding and assisting in the robbery of the mail, may be proved by a person who was present, and heard his testimony; provided he can repeat the testimony as the witness gave it, and not merely, what he conceives to be the substance of it. He may refresh his memory from notes, taken at the time; or from a newspaper, printed by him, containing the evidence as taken down by himself. *United States v. Wood*, 3 Wash. C. C. R. 440.

102. To prove the rate of interest allowed in any one of the States of the United States, the law of the State must be produced. *Jaffray v. Dennis*, 2 Wash. C. C. R. 253.

103. No paper writing ought to be received as testimony, unless it possesses those solemnities which the law requires. Its authentication must not rest upon probability, but must be as complete as the nature of the case admits. 1 *Burr's trial*, 98.

104. The declarations of third persons, not forming a part of the transaction, and not made in the presence of the accused, cannot be received in evidence. 2 *Burr's trial*, 539.

105. The acts of the accused, in a different district, which constitute in themselves substantive causes for a prosecution, cannot be given in evidence unless they go directly to prove the charges laid in the indictment. *Id.*

106. A deposition, in which the witness swore that he had examined, and believes an account against him, to which he refers, to be right, because the clerk who made it out would not have stated it incorrectly, although he has never compared it with the books of his creditors, from which it was taken, may be read in evidence. *The Executors of Cambioso v. Assignees of Maffett*, 2 Wash. C. C. R. 98.

107. The account is not proved to be acknowledged by this deposition, but goes to the jury, who will decide whether the deposition is sufficient proof of the items contained in it. *Id.*

EVIDENCE IV.

Verdicts and judgments of Courts of Record.

108. A judgment or decree of a Court of competent jurisdiction is conclusive wherever the same matter is again brought in controversy. *Hopkins v. Lee*, 6 *Wheat.* 109. 113.

109. But the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree. *Id.*

110. Where a party claims, in the Admiralty, under a condemnation in a foreign Court, the libel, or other proceeding, anterior to the sentence, must be produced as well as the sentence itself. *The Nereyda*, 8 *Wheat.* 108. 168.

111. What evidence of proprietary interest is required on further proof. *Id.* 171.

112. A recovery in ejectment is conclusive evidence in an action for mesne profits against the tenant in possession, but not in relation to third persons. But where the action is brought against the landlord in fact, who received the rents and profits, and resisted the recovery in the ejectment suit, although he was not a party to that suit, and did not take upon himself the defence thereof upon the record, but another did, as landlord. *Chirac v. Reinecker*, 11 *Wheat.* 296. 297. *S. C.* 2 *Peters*, 613.

113. A recovery in ejectment is conclusive evidence in an action for mesne profits against the tenant in possession, but not in relation to third persons. But where the action is brought against the landlord in fact, the record in the ejectment suit is admissible to show the possession of the plaintiff, connected with his title, although it is not conclusive upon the defendant in the same manner as if he had been a party upon the record. *Id.* *S. C.* 2 *Peters*, 613.

114. A judgment or decree of a Court can be used as evidence in another suit only as against parties and privies; and if in the second suit there are new parties, against whom the judgment could not have been used, had it been adverse, they cannot introduce it in their favour. *Baring v. Fanning*, 1 *Paine*, 549.

115. And it makes no difference that the new parties as assignees of a chose in action are endeavouring, with the assignor, to enforce the same right that was established in the former suit in favour of the assignor. *Id.*

116. And in such a case where a Court of Chancery had ordered an account, and made a decree thereupon in favour of the assignor, it was held not to be a matter decided *ex directo* by a Court of competent jurisdiction, so as to bring it within the exception to the general rule. *Id.*

117. Under the clause introduced into policies of insurance, relative to the sentence of a foreign Court of Admiralty, the foreign sentence is not conclusive, in our Courts, to falsify the warranty, which the assured is still at liberty to vindicate. The underwriters may, nevertheless, read the proceedings of the foreign Court, as evidence; though not as conclusive evidence. *Galbreath v. Gracy*, 1 *Wash. C. R.* 219.

118. The record of a trial, and verdict against the plaintiff, in a suit brought by him against another person, cannot be given in evidence by another defendant. *Hurst's Lessee v. M'Neil*, 1 *Wash. C. C. R.* 70.

119. A record of a judgment obtained by the plaintiff in North Carolina, against James Reed, administrator *de bonis non* of Bartow, was properly given in evidence to the jury; parol evidence having proved that the defendant, Joseph Read, had attended the taking of depositions in the case, while depending in the Court of North Carolina, and that notice of this suit was given to him. *Stevell v. Read*, 2 *Wash. C. C. R.* 275.

120. The whole record of the proceedings of the Admiralty Court in which the

property insured was condemned, cannot be read in evidence, the sentence of the Court not requiring the whole proceedings to explain it. *Marshall v. Union Ins. Co.*, 2 Wash. C. C. R. 452.

121. Unless under peculiar circumstances, no part of the record, other than the sentence, is evidence. *Id.*

EVIDENCE V.

Proof of records and judicial proceedings.

122. A certified copy of a registered deed cannot be given in evidence, if within the power of the party claiming under it to produce the original, unless there be some express provision by statute, making an authenticated copy evidence. *Brooks v. Marbury*, 11 Wheat. 78. 82.

123. The exclusive jurisdiction over wills of personalty belongs to the appropriate Court having the peculiar cognizance of testamentary matters; and before any testamentary paper, foreign or domestic, can be admitted in evidence, it must receive probate in such Court. *Armstrong v. Lear*, 12 Wheaton, 169. 175.

124. A former judgment is no evidence in an action, except between the same parties or their privies. *Taber v. Perrot*, 2 Gallis. 565.

125. An inquest of office by the Attorney General, for lands escheating to the government by reason of alienage, is evidence of title in all cases; but is not conclusive evidence against any person, who was not tenant at the time of the inquest, or party or privy thereto. Such person may prove, that there are lawful heirs, not aliens, *in esse*. *Stokes v. Dawes*, 4 Mason, 268.

126. A copy of a deed, duly recorded, is, after sixty years, admissible in evidence to establish the grant, under which the party claims title to the land in controversy. *Id.*

127. Where a marriage is proved, a recital in a deed, sixty years old, that the grantor is heir, and sells as such, is *prima facie* evidence of the fact, if possession of the property has been uniformly held ever since, under that deed. *Id.*

128. A Sheriff's deed cannot be given in evidence, without producing the judgment and execution under which the sale was made; these documents being necessary to show that the Sheriff had authority to sell. *Den v. Wright et al.* 1 Peters' C. C. R. 65.

129. A deed executed by administrators, under an order of the Orphan's Court, cannot be read in evidence, without producing the order of the Court. *Id.*

130. The recording of a deed in the proper office, is *prima facie* evidence, and no more, that the deed was regularly proved and admitted of record. *Lessee of Talbot v. Simpson*, 1 Peters' C. C. R. 188.

131. The commission of a justice of the peace, and judge of the Court of Common Pleas, is conclusive evidence of his appointment. *Id.*

132. A patent for land, lying in the New Purchase in Pennsylvania, is evidence that all the previous steps leading to it had been regularly pursued; unless the contrary is proved by the person, who attempts to impeach the validity thereof. *Lessee of Brown v. Galloway*, 1 Peters' C. C. R. 291.

133. The attestation of a record of the proceedings of a Court, according to the provisions of the act of Congress, must be in conformity with the form used in the State from whence the record comes, and the only evidence of this fact is the certificate of the presiding judge of that Court. *Craig v. Brown*, 1 Peters' C. C. R. 352.

134. The written laws of foreign countries must be proved by the laws themselves, if they can be procured; if not, inferior evidence of them may be received. The unwritten laws or usages of such countries may be proved by parol; and when proved, the Court have a right to construe them, and decide on their effect. *Consequa v. Willings et al.* 1 Peters' C. C. R. 225.

135. If a record be produced to prove a fact, and is found to be deficient or imperfect, it cannot be assisted by evidence *de hors* the same ; but the perfect record must be produced. *Lessee of James v. Storkey et al.* 1 Wash. C. C. R. 330.

136. After a record of the proceedings of a foreign Court of Admiralty have been read in evidence, without objection, it is too late to object to it on argument. *Russell v. Union Ins. Co.* 1 Wash. C. C. R. 409.

137. The copy of a record of the condemnation of the property insured, was offered in evidence without the seal of the office who made out the copy ; but there were on the margin of each page, flourishes with the pen. No proof was given that the officer had or had not a seal. The Court rejected the evidence. *Talcott v. Delaware Ins. Co.* 2 Wash. C. C. R. 449.

138. Upon the plea of *nulli tel record* to debt, on a judgment in another State, the seal of the Court must be annexed to the record itself ; and it is not sufficient, that it is annexed to the certificate of the judge of the Court, authenticating the attestation of the clerk who certifies the record. *Turner v. Waddington*, 8 Wash. C. C. R. 126.

139. When an affidavit purports to be taken before an individual, who calls himself a magistrate, and a certificate is produced from the governor, certifying that a person of that name is a magistrate, the paper is not sufficiently authenticated, inasmuch as it does not set forth that the person, who actually administered the oath, is a magistrate. 1 *Burr's trial*, 99.

EVIDENCE VI.

Public writings not judicial.

140. Under the act of the 26th of May, 1790, c. 38, [xi.] copies of the legislative acts of the several States, authenticated by having the seal of the State affixed thereto, are conclusive evidence of such acts in the Courts of other States, and of the Union. No other formality is required than the annexation of the seal ; and, in the absence of all contrary proof, it must be presumed to have been done by an officer having the custody thereof, and competent authority to do the act. *United States v. Amedy*, 11 *Wheat.* 392.

141. The plaintiffs proved by a surveyor, that he had run most of the lines and streets in "Howard's late addition to Baltimore town" as the same were marked in a particular plot, upon which the lot of ground was located for which the ejectment was brought, and then gave the plot so authenticated in evidence. In the volume in which this was contained were also other plots. The defendant then offered in evidence another plot, in the same volume, but gave no evidence to authenticate it, claiming to use the same in evidence, from the fact that it was found in the same volume which contained the plot already in evidence, and which had been specially authenticated by the surveyor. Held, that as the book itself had not been authenticated as a book of public plots regularly made, the whole volume was not in evidence, and if the defendant meant to use any plot in the same, it was his duty to establish it as evidence, by competent proofs of its particular authenticity. *Chirac et al. v. Reinecker*, 2 *Peters*, 613.

142. A paper purporting to be "a certified extract from the general draft of certain districts, as framed by the surveyor-general, remaining in his office, under the seal of the office," is not evidence ; it being only an extract, and not being a copy of an office paper. *Lessee of Griffith v. Tunckhouser*, 1 *Peters' C. C. R.* 413. *Et vide Lessee of Griffith v. Evans et al.* 1 *Peters' C. C. R.* 166.

143. The proceedings of the Board of Property of Pennsylvania, directing a survey of certain districts, and the survey and plot returned thereon, is not evidence. *Id.*

144. *Ex parte* proceedings by the Board of Property, under which a survey was made, which, in the opinion of the board, ascertained the invalidity of a former sur-

vey, and in consequence of which the plaintiff's survey was ordered to be struck from the records of the land office, cannot be read in evidence. Such proceedings have no effect on the plaintiff's title. *Lessee of Griffith v. Evans et al.* 1 *Peters' C. C. R.* 166.

145. A patent for land is only *prima facie* evidence of title, but if the previous steps for vesting a title be not performed, proof of such omission will defeat the same. *Lessee of Huidekoper v. Burrus*, 1 *Wash. C. C. R.* 109.

146. A survey made by a deputy surveyor belonging to a different district from that in which the survey is made, although specially authorized to make it, by an order from the Surveyor-General, is not valid, and cannot be given in evidence, either as an execution of the warrant, or as evidence *per se*, to show the location of the warrant, being made on *ex parte* evidence. But the surveyor who made it, may use it as a memorandum, to show how the land might be located, from the calls of the warrant. *Lessee of Gordon v. Kerr et al.* 1 *Wash. C. C. R.* 322.

147. The certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person, accredited as a minister by the government of the United States. *United States v. Liddle*, 2 *Wash. C. C. R.* 205.

148. The certificate of the commissioners of Virginia, appointed under the law of that State, to adjust the claims for settlement and pre-emption rights to lands, which were afterwards found to be within the limits of Pennsylvania; being *ex parte*, is not evidence of a settlement on the lands in dispute. The holder of the certificate must prove, by other testimony, his settlement to be prior to that, under which the defendant claims. *Swan v. Hughes*, 1 *Wash. C. C. R.* 216.

149. A connected map of a number of surveys, which had been recorded in the county, is evidence, accompanied by the explanations of the surveyors, without producing the separate surveys. *Jones v. Bache*, 3 *Wash. C. C. R.* 199.

EVIDENCE VII.

Proof of private writings.

150. Secondary evidence of the contents of written instruments is not admissible where the originals are within the control or custody of the party. *Sebree v. Dorr*, 9 *Wheat.* 558. 563.

151. Secondary evidence of the contents of written instruments is admissible, wherever it appears that the original is destroyed, or lost, by accident, without any fault of the party. *Renner v. Bank of Columbia*, 9 *Wheat.* 581. 596.

152. In the case of a lost note, it is not necessary that its contents should be proved by a *notarial* copy. All that is required is, that it should be the best evidence the party has it in his power to produce. *Id.* 597.

153. The English practice of requiring a special count in the declaration, as upon a lost note, in order to let in secondary evidence of its contents, has not been adopted in the United States. *Id.* 597.

154. If a party intend to use a written instrument in evidence, he must produce the original, if in his possession. But if it is in the possession of the other party, who refuses to produce it, after notice, or if the original is lost or destroyed, secondary evidence (being the best which the nature of the case allows) will be admitted. *Riggs v. Tayloe*, 9 *Wheat.* 483.

155. The party, in such case, may read a counterpart, or, if there is no counterpart, an examined copy; or, if no such copy, may give parol evidence of the contents. *Id.* 486.

156. Where a writing has been voluntarily destroyed for fraudulent purposes, or to create an excuse for its non-production, secondary evidence of its contents is not admissible. But where the destruction or loss (although voluntary) happened through mistake or accident, such evidence will be admitted. *Id.* 486.

157. A settled account is only *prima facie* evidence of its correctness, at law or in equity; it may be impeached by proof of fraud, or omission, or mistake; and if it be confined to particular items of account, concludes nothing as to other items not stated in it. *Perkins v. Hart*, 11 *Wheat.* 237. 256.

158. Where the execution of the original paper is distinctly admitted, and the copy is admitted to be wholly in the handwriting of the party against whom it is attempted to be used, and who, from the nature of the transaction, must be presumed to have the custody of the original, notice to produce the original, in order to give the copy in evidence, is not necessary. A case of this nature forms a just exception to the general rule, and it is not competent for the individual to allege against his own admission, that this copy, which must be presumed to have come through his hands into the possession of the opposite party, does not, or may not, contain all the verity and certainty of the original. Under these circumstances, the copy may be fairly regarded for all the purposes for which it is offered as an original. *Carroll v. Peake*, 1 *Peters*, 22.

159. Every thing must be presumed in favour of the decision of the Court below, until the contrary appears. Upon this principle, letters, forming part of the evidence in the Court below, which have been lost or mislaid, must be presumed to have supported the decision of the Court, so far as they related to the matters in controversy. *Id.* 22.

160. A joint and several bond, which was not introduced as general evidence, as to all the parties who were named in it, but only as to one of the obligors, and was connected with the title derived under him, was properly allowed to go to the jury, upon proof of its execution, by that obligor only. Proof of his signature was, under the circumstances, *prima facie* evidence of his execution of the instrument. *Conard v. The Atlantic Insurance Company*, 1 *Peters*, 451.

161. A will after contestation and probate, was mislaid, and after nine years a copy was allowed to be read to the jury, in a real action for part of the land devised in the will. *Spencer et ux. v. Spencer*, 1 *Gallis.* 622.

162. A notarial copy of a note was permitted to go to the jury as a fair ground for presuming, when taken in connexion with the testimony of a witness, that the paper exhibited to the notary was the same, which had been in the possession of the witness, and acknowledged by one of the defendants. *Peabody v. Denton*, 2 *Gallis.* 351.

163. After a great lapse of time it will be presumed that no demand will be made upon such note by a *bona fide* holder. *Id.* 353.

164. If the instrument supposed to be forged is destroyed or suppressed by the prisoner, the tenor may be proved by parol evidence; the next best evidence is the rule; therefore if there be a copy which can be sworn to, that is the next best evidence. *U. States v. Britton*, 2 *Mason*, 464.

165. A check drawn in *Philadelphia* or *Boston*, in favour of the prisoner, who was then in *Philadelphia*, and who produces the check altered in *Boston*, if there be no evidence that it was altered elsewhere, it is *prima facie* evidence that it was altered in *Massachusetts*, that being the first State where it is known to be altered. *Id.*

166. A receipt in full of all demands is open to inquiry and explanation. A settled account for wages, &c. is not conclusive; but it may be surcharged and falsified. *Harden v. Gordon*, 2 *Mason*, 541.

167. Where a suit in one State brings incidentally in question the title to land held under a devise in another State, it is not necessary that there should be a probate of the will in the State where the suit is brought, before it can be used as evidence of title. *Slack v. Walcott*, 3 *Mason*, 508.

168. A receipt in full is only *prima facie* evidence of what it purports; and if clearly proved to have been obtained by fraud, mistake, or ignorance of the rights of the party, it will be examined into, and corrected in a Court of Law as well as in a Court of Equity; but if such evidence is not given, the presumption in favor of its validity, will prevail. *Thompson et al. v. Faupal*, 1 *Peters' C. C. R.* 182.

169. If the legal rights of a party are doubtful, honestly contested, and opportunity given him to satisfy himself in relation to them, a receipt given by him for less than he was in strictness entitled to, will not be set aside. *Id.*

170. A certificate given by a supra-cargo, upon his return from the voyage insured; and who at the time it is offered, is dead, is inadmissible to prove the plaintiff's interest in the return cargo. Evidence cannot be given to prove what the supra-cargo had declared on this subject. *Beale v. Pettit et al.* 1 Wash. C. C. R. 241.

171. A paper signed by A B, as attorney for B C, cannot be read in evidence, without the power of attorney being produced. *Lessee of James v. Gordon et al.* 1 Wash. C. C. R. 333.

172. Deeds of commissioners of taxes were suffered to be read, *reserving the question of their regularity*; although it did not appear that district assessors had been appointed; and the deeds were under the common seal of the commissioners, and not under the private seal of each; and the law authorized the commissioners to sell, and not to convey. *Id.*

173. Although a paper has been produced by one party on notice from the other, it does not become evidence, unless from its legal character it is entitled to be such. *Hylton's Lessee v. Brown*, 1 Wash. C. C. R. 343.

174. An original will of lands, not proved according to law, cannot be read in evidence, although produced on the notice of the opposite party, as the will of the person named in it. *Id.*

175. Although the recitals in a warrant, to another than a party to the suit, may not be evidence of the fact stated in them, yet when they are corroborated by circumstances, such as the antiquity of marks on the ground, and by the correspondence between the marked lines and those stated in the warrant, the jury may consider the recital, that a previous warrant for the land had issued, as true; the papers of the surveyor general, to whom the original warrant may have been returned, having been destroyed by fire. *James v. Stookey*, 2 Wash. C. C. R. 139.

176. An invoice of goods received by the consignee, retained by him, and not objected to, and the truth of it not disproved, is evidence that all the goods enumerated in it were received by the consignee. *Field v. Moulson*, 2 Wash. C. C. R. 155.

177. If a log-book be offered in evidence, it should be proved to be the book kept on the voyage. It is not sufficient to prove the handwriting of the mate as to some of the entries in it. *United States v. Mitchell*, 2 Wash. C. C. R. 478.

178. A testamentary declaration of the captain of the vessel, not under seal, taken at Chagres, on the Spanish main, by the governor *pro tempore*, who is also a judge authorized to take such declarations, there being no notary, and proved to be an original paper in the usual form, there being no seal at Chagres; was admitted in evidence. *Blagg v. Phoenix Insurance Company*, 3 Wash. C. C. R. 5.

179. The contents of a receipt, said to have been signed by one of the defendants, or the manner of signing it, cannot be given in evidence—the receipt should be produced. *Romayne v. Duane*. 3 Wash. C. C. R. 246.

180. The certificate of the Register of the Treasury Department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the Secretary of the Treasury, under the seal of that department, that he is the Register, is not evidence. It must appear, not only that the officer who gives the certificate, has the custody of the papers, but that he is authorized by law to certify them; and the Register is not so authorized; a sworn copy should have been produced. *Bleeker v. Bind*, 3 Wash. C. C. R. 529.

181. The log-book is, by an act of Congress, made legal evidence in proof of desertion by a sailor, but is not incontrovertible and conclusive. It ought not to be admitted to prove any fact, but that in which the act of Congress permits it to be evidence. *The Brig Phoenix*, 1 Adm. Deois. 201.

EVIDENCE VIII.

Admissibility of parol evidence to explain, vary, or discharge written instruments.

182. A parol exchange of lands, or parol evidence, that a conveyance should operate as an exchange, will not convey any estate or interest in lands. *Clark v. Graham*, 6 *Wheat.* 577.

183. General rule : that parol testimony is not admissible to vary a written instrument. *Hunt v. Rousmanier*, 8 *Wheat.* 174. 211.

184. In equity, cases of fraud and mistake are exceptions to this note. *Id.* 211.

185. Where a voluntary deed is impeached as fraudulent, evidence of judgments against the grantor is admissible as proof, (among other facts,) that he was indebted at the time of executing the deed, although the grantee was not a party to the suits on which the judgments were obtained. *Hinde v. Longworth*, 11 *Wheat.* 199. 210.

186. Evidence is admissible to show another consideration than that expressed in the deed, if not inconsistent with the consideration expressed. *Id.* 214.

187. In an action upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper been produced, neither party could have been permitted to show his inducements to make it, or to substitute his understanding of it, for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. *Tayle, v. Riggs*, 1 *Peters'* 598.

188. When a written contract is to be proved, not by itself but by parol testimony, no vague, uncertain recollection concerning its stipulations, ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily ; and if that cannot be done, the party is in the condition of every other suitor in Court, who makes a claim which he cannot support. *Id.*

189. Where the parties to a note agreed to a demand of payment at a stipulated place, instead of a demand on the person of the maker, although the place of demand was not expressed on the face of the note, the Court held that parol testimony was admissible to prove the agreement. Such agreement did not alter the written contract, but supplied an extrinsic circumstance which the parties were at liberty to supply. *Bren's Executors v. the Bank of the Metropolis*, 1 *Peters*, 92.

190. The declarations of the testator before and at the time of making a will, and afterwards, if so near as to be a part of the *res gestæ*, are admissible to shew fraud in obtaining the will. But not declarations at any distance of time after the will has been executed, especially where the will has always been in the testator's possession. *Smith v. Fenner*, 1 *Gallis.* 170.

191. The declarations of the testator as to his *intention* to alter his will, and being prevailed upon not to do so, are not admissible to show that the will was fraudulently prevented from being revoked, there being no act or attempt shown to revoke the will, &c. *Id.*

192. Evidence of other writings proved by witnesses, and also of witnesses, is admissible to show that the peculiarities in an alteration in a will, are such as the party frequently used in his ordinary handwriting. *Id.*

193. What constitutes latent and patent ambiguities, and when parol evidence is admissible to explain them. *Peisch v. Dickinson*, 1 *Mason*, 9.

194. A policy of insurance was underwritten on the entirety of a ship ; and the ship's papers on the voyage showed a joint ownership of the master and the as-

sured. *Held*, that parol evidence was not admissible to contradict the ship's papers, and prove a sole ownership in the assured, and that the papers were all wrong and founded in mistake. *Quare*, if a title to a ship engaged in foreign trade can pass by parol? *Ohl v. The Eagle Ins. Co.* 4 *Mason*, 172.

195. If the log-book states a desertion, it may be repelled by proof of the falsity of the entry, or its being made by mistake. *Orne v. Townsend*, 4 *Mason*, 541.

196. When a contract is in writing, conversations previous to and leading to it, cannot be given in evidence. *Gilpin v. Consequa*, 1 *Peters' C. C. R.* 85.

197. Parol evidence of the declarations of an auctioneer, contrary to the written terms of sale, is not admissible; but such evidence, as to the property intended to be sold by him, is proper. *Lessee of Wright v. Deklyne*, 1 *Peters' C. C. R.* 199.

198. Written documents, certified by foreign notaries, offered as evidence, may be contradicted by parol testimony. *United States v. The Jason*, 1 *Peters' C. C. R.* 450.

199. Transcripts of accounts in the Treasury Department are written documents, and their construction is matter of law. *U. States v. Willard*, 1 *Paine*, 539.

200. Witnesses acquainted with the mode of accounting at the Treasury, cannot be called to give their opinion as to the effect of particular charges. If there is any obscurity which requires explanation, the officers of the Treasury should be examined. *Id.*

201. As where sums were charged as advanced to a paymaster of the militia, and witnesses were examined to prove that they believed, from the manner in which the charges were made, that a part of such sums were to pay the regular troops, their testimony was held inadmissible. *Id.*

202. In an action to recover the balance of a settled account, and of certain bills of exchange accepted by the defendant; the defendant offered to prove that the plaintiff's intestate acknowledged himself to be indebted to the defendant on another account, which included the settled account, and upon which a larger amount was due than that claimed, which the intestate promised to pay. The Court allowed evidence to be given, as it was not offered to affect the settled account, but to establish a claim independent of it, and which the plaintiff's intestate promised to pay. *Vuyton, Adm. v. Brenell*, 1 *Wash. C. C. R.* 467.

EXECUTOR.

1. An executor or administrator is not liable to a judgment beyond the assets to be administered, unless he pleads a false plea. *Siglar v. Haywood*, 8 *Wheat.* 675.

2. If he fail to sustain his plea of *plene administravit*, it is not necessarily a false plea, within his own knowledge: and if it be found against him, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only. *Id.*

3. In such a case, the judgment is *de bonis testatoris* and not *de bonis propriis*. *Id.*

4. Where administrators, acting under the provisions of an act of assembly of the State of Ohio, were ordered by the Court, vested by the law with the power to grant such order, to sell real estate, and before the sale was made the law was repealed, the powers of the administrators to sell, terminated with the repeal of the law. *Bank of Hamilton v. Dudley's Lessee*, 2 *Peters*, 493.

5. The lands of an intestate descend not to the administrator, but to the heir; they vest in him, liable to the debts of his ancestor, and subject to be sold for those debts. The administrator has no estate in the land, but a power to sell under the authority of a Court of Common Pleas. This is not an independent power to be exercised at discretion, when the exigency in his opinion may require it; but it is conferred by the Court, in a state of things prescribed by the law. The order of the

Court is a pre-requisite, indispensable to the very existence of the power; and if the law which authorizes the Court to make the order, be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but it is the exercise of a legislative power, which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the legislature. *Id.*

6. The pendency of a commission of insolvency is no bar to a *scire facias* against an administrator on a judgment had against him. *Hatch v. Eustis*, 1 *Gallis*. 160.

7. If *after verdict* and *before judgment* the defendant die, and his administrator become party to the suit, and judgment pass against him, and execution issue thereon, and be returned unsatisfied; on *scire facias* against the administrator, he may well plead no assets, or insolvency, for he had no time to plead such plea in the original suit. *Id.*

8. *Quære*, In such case, if any execution ought to have issued on the original judgment, until after a *scire facias* against the administrator? *Id.*

9. A covenant by an executor, on a conveyance of land of his testator, in his capacity as executor, "and not otherwise," is not binding on him in his individual capacity. *Thayer v. Wendell*, 1 *Gallis*. 37.

10. Where real estate of an intestate was ordered by the legislature to be sold by a person appointed by the legislature, for payment of his debts, the general administrator upon the estate may be a purchaser at the sale. If the sale by the agent be fraudulent, yet a *bona fide* purchaser without notice shall hold against the heirs of the deceased. *Dexter v. Harris*, 2 *Mason*, 531.

11. An administrator, who is also mortgagee of the real estate of his intestate, *in his own right*, is not liable to account as administrator for the money, which he receives upon the sale of such estate, as mortgagee, although he sells it with general warranty. Such sale does not bar the equity of redemption of heirs. *Dexter v. Arnold*, 3 *Mason*, 284.

12. *Quære*, How far a Court of Equity will decree upon the proof by a single witness, where the answer puts the matter in issue, although only by a declaration of ignorance, &c. by administrators? *Hunt v. Rousmaniere*, 3 *Mason*, 294.

13. An administrator is not liable to pay interest upon assets in his hands, unless under special circumstances. Neither is a partner on partnership accounts, before settlement and balance struck. *Dexter v. Arnold*, 3 *Mason*, 284.

14. An executor, as such, has a right to enter goods belonging to his testator at the Custom-House; and, as executor, to give bonds for the duties. Such bonds bind the estate of the testator. If the executor become insolvent, the United States may, in equity, claim payment of the debt due for duties, from the sureties upon the probate bond of the executor, where the executor has wasted the assets, and are not obliged to resort for payment to the surety on the Custom-House Bond in the first instance. *United States v. Aborn*, 3 *Mason*, 126.

15. An administratrix, after a decree of the Probate Court ascertaining the distributary shares of the intestate estate, took guardianship of one of the persons entitled to a share, who was a minor; it was *held*, that, by operation of law, she held the amount by way of retainer, as guardian, and not as administratrix; and that no suit lay against her sureties upon the administration bond for the amount due her ward. *Taylor v. Deblois*, 4 *Mason*, 131.

16. If a feme covert gives a legacy in her will to her husband out of her separate property for his maintenance, under a power of appointment, the executors are not liable to be attached as trustees of the husband until after a probate of the will, and the taking upon themselves of the administration thereof. *Quære*, if a legacy given by way of annuity to a husband for his maintenance can be attached in the hands of the executors? Is not such an annuity, in its very nature, a sum to be paid *personally* to the husband by the executors, as the bounty of the testator? *Picquet v. Swan*, 4 *Mason*, 443.

17. Although no suit can be maintained in our Courts by a foreign executor or administrator, unless he has taken out administration here; yet this principle does not apply, except where the party sues in right of the deceased.

If he sues in his own right, although the right be derived under a foreign will, no administration need be taken out here, if it does not affect the real estate passed by the will here. *Trecothick v. Austin*, 4 *Mason*, 16.

18. Where an estate is insolvent, and distribution of the assets is decreed, under the laws of *Rhode Island*, and afterwards new assets come into the hands of the administrator, more than sufficient to pay all the debts, a suit will lie against the administrator for payment, in behalf of the creditors, notwithstanding the statute of limitation precludes an original suit against the administrator; for the new assets are a trust fund for the creditors, and the heirs can claim distribution only after all the debts are paid. *Dexter v. Arnold*, 3 *Mason*, 284.

19. Where the plaintiff joined counts on a bill of exchange as endorsee, with counts on bills of exchange, "as beneficiary heir and administrator of the estate of J. C. P. deceased," by the law of France, and thereby proprietor of the bills, it was held, that the latter counts were in his representative character, and there was a misjoinder. In such a case the plaintiff cannot sue on the bills of the intestate in the Circuit Court, without taking out letters of administration in *Massachusetts*, *Picquet v. Swan*, 3 *Mason*, 469.

20. If the plaintiff makes advances for another before and after his death, in an action against the executor, for money laid out and advanced for the testator, the advances made after the death of the testator cannot be recovered. *Hourquebie et al. v. Girard*, 2 *Wash. C. C. R.* 213.

21. Interest on money in the hands of the administrator is not chargeable, when the same is retained in the hands of the administrator, until a suit shall determine the right of the claimant thereto. *Wade v. Administrators of Wade*, 1 *Wash. C. C. R.* 477.

22. Defendant obtained letters testamentary from the Register's office in Philadelphia, to a supposed will of W. B., which, on an issue, was determined not to be the will of W. B. In relation to another supposed bill, the same determination took place, and letters of administration to the estate of W. B. were then granted to the plaintiff. While the controversy as to the first supposed will was pending, the defendant took possession of the estate of W. B. and went on to administer the same, until the appointment of an administrator *pendente lite*, to whom the defendant delivered all the effects of W. B.

The defendant having received letters testamentary on a will duly proved, was authorized to perform every act proper for an executor to do, notwithstanding the pendency of the question relative to the validity of the will. *Bradford v. Boudinot*, 3 *Wash. C. C. R.* 122.

23. The defendant was authorized and it was his duty (believing the paper to be the last will of W. B.) to support the first probate; and he is entitled to retain out of the estate, the expenses he was put to in that litigation; as also, the usual commissions for managing the estate while in his hands. There is no ground for considering the defendant an executor *de son tort*, in this case. *Id.*

FACTOR.

1. It is believed to be a general rule that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority. Yet, if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he could not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. *Schimmelpennick et al. v. Bayard et al.* 1 *Peters*, 290.

2. Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by th

principal; and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal. *American Fur Company v. United States*, 2 *Peters*, 358.

3. A factor is not only bound to good faith, but to reasonable diligence. If therefore he sell to one who is insolvent or doubtful, and the fact upon reasonable diligence might have been known, he is answerable for the loss. In such case the sale will in law be deemed a sale on account of the factor. *Burrill v. Phillips*, 1 *Gallis*, 360.

4. The mere relation of principal and factor does not confine the right of the latter to recover for advances to the mere fund deposited with him. Such advances are made on the joint credit of the fund and person. *Id.*

5. A factor is bound to good faith and reasonable diligence. He cannot pledge his principal's property for his own debts; but for payment of duties accruing on the goods, he may. *Evans v. Potter*, 2 *Gallis*, 13.

6. A factor has, by the general law, the personal security of the owner, as well as a lien on the goods for his advances; but by contract he may waive the right to a personal responsibility. *Peisch v. Dickinson*, 1 *Mason*, 9.

7. A factor cannot pledge the goods of his principal for his own debts; and if he does, the principal may after a demand and refusal maintain trover for them against the pawnee. *Van Amringe v. Peabody*, 1 *Mason*, 440.

8. If a factor *del credere* sells the goods of his principal, and takes negotiable securities in payment, and fails before they become due, and assigns those securities to his assignee, and the assignees afterwards receive the money when the notes became due, the principal may recover from the assignees, subject to a deduction of the lien of the factor for his commissions and charges. *Thompson v. Perkins*, 3 *Mason*, 232.

9. Wherever the principal can trace his property, as distinct from that of the factor, he can recover it, into whosoever hands it may come. *Id.*

10. A factor to whom a general shipment has been intrusted as security for advances, commissions, and expenses, has a special property only in the shipment, and subject to his lien for those charges, the owner may dispose of them as he pleases, and the conveyance will carry the right. *Ship Packet*, 3 *Mason*, 334.

11. Where a factor was authorized to sell goods at a limited price; and he afterwards sold them below that price, and sent an account to his principal of the sales and prices, and authorized him to draw for the balance of the account; and the principal received the account, and drew for the balance, and made no objections in his letters, or otherwise, to the conduct of the factor in the sales, it was held, that his conduct amounted to a ratification of the factor's proceedings. *Richmond Manufacturing Co. v. Starks and others*, 4 *Mason*, 296.

12. If a consignee of goods agree that for advances made "he will hold for reimbursement on the amount and nett proceeds of such goods, which are only considered answerable for said amount advanced," it is a waiver of any personal claim against the owner for reimbursement. *Peisch v. Dickson*, 1 *Mason*, 10.

13. Interest is allowable in an action against a consignee or bailiff of goods, "to sell the same and render a reasonable account," and also in actions for money had and received from the time of a demand made, when the defendant has refused to account or to make payment, or has converted the money to his own use. *Pope v. Barrett*, 1 *Mason*, 117.

14. The lien of a factor is a mere right of retaining the goods of his principal, until his demands in that capacity are settled; and it gives the factor a rightful possession, which cannot be divested without his own consent. But as against his principal, it gives him no general or special property, whatever may be the case in respect to mere strangers. *Menny v. Head*, 1 *Mason*, 321.

15. No man can compel another to render him acts of friendship, or service, of any kind whatsoever, gratuitously, or with a view to compensation. But if the person applied to consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made. *Walker v. Smith*, 1 *Wash. C. C. R.* 152.

16. In commercial agencies, this rule should be strictly enforced. *Id.*
 17. The relinquishment of commission on an agency, does not release from the effects of negligence. *Id.*

18. An agent who does not comply with his instructions, is liable for the loss occasioned thereby, although the services were gratuitously rendered. *Id.*

19. Where a power to an agent in general, he may do any thing to bind his principal, which is within the scope of his authority. *Allen v. Ogden*, 1 Wash. C. C. R. 174.

20. If the agency be special, every thing which may be done is void, unless in strict conformity with the authority. *Id.*

21. An agent or factor, who is ordered by his principal to ship goods in his possession, has no right to retain more than enough to secure any lien he may have upon the goods. *Jolly v. Blanchard*, 1 Wash. C. C. R. 252.

22. If he retains the whole, because of a lien for a small sum, and any loss follow his breach of his orders, he will be liable for the same.

23. An agent, if a discretion is given to him, is bound to act, to the best of his judgment, for the benefit of his employer. If his orders be positive, he must either refuse to act, or he is bound to a strict observance of them. If the orders are ambiguous, the construction must be taken most strongly against him who gave them. *Kingston v. Kincaid*, 1 Wash. C. C. R. 455.

24. Where a commission merchant takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable to his principal for the amount of the goods; as he has deprived him of the means of pursuing his claim against his debtor, by extinguishing the debt due by simple contract. *Jackson v. Baker*, 1 Wash. C. C. R. 394.

25. A demand of the bond, before action brought against him by the principal; for the proceeds of the sale of the goods, is not necessary. *Aliter*, if the bond had not been taken for any sum but that due for the goods of the principal. S. C. 445.

26. The defendant sent a parcel of sugars to the plaintiff, without orders to do so, which sold at a loss. When the plaintiff received notice of the shipment, he expressed his regret that it had been made; but he neither expressly accepted, nor refused it. In four days after, he refused taking it on his own account, and he notified the defendant that he would sell the sugars on his, the defendant's account. *Held*, that the plaintiff had a right to deliberate for a few days; and was not bound to receive the shipment on his own account, because he did not reject it in the first instance. *Kingston v. Kincaid et al.* 1 Wash. C. C. R. 454.

27. A consignee, who receives merchandise from the supra-cargo for sale, and who knows that the supra-cargo is the agent of others, contracts a debt with such shipper for the proceeds of his portion of the cargo; and the supra-cargo has no right to appropriate the same to the payment of his private debt. *Merrick v. Bernard*, 1 Wash. C. C. R. 479.

28. A merchant, who is in the habit of insuring for his correspondent, and is ordered to make insurance, which he neglects, or imperfectly executes, is answerable as if he was himself the assurer, and entitled to the premium. *De Tastett & Co. v. Croussillat*, 2 Wash. C. C. R. 132. *Morris v. Summerl*, 2 Wash. C. C. R. 203.

29. When the insurance has been imperfectly made, and not altogether neglected, it may be questioned whether the agent is liable for more than the damages, equal to the chance of the indemnity which would have been afforded by the exact execution of the order. *Id.*

30. If a reasonable diligence was used by the agent to effect the insurance, he is not liable. *Id.*

31. The neglect of the agent to give his principal notice of his having been unable to execute the order for insurance, will make him liable in damages. *Id.*

32. An action cannot be maintained against the agent, for transactions with his principal through him, unless a specific agreement is made with the agent, that he

will be personally liable for the acts of his principal. *Bradford et al. v. Eastburn*, 2 Wash. C. C. R. 219.

33. Where the agent has acted illegally, in refusing to deliver goods sent by his principal to him for others, upon a contract for their sale and delivery made with the principal, the remedy is by action against the principal, and not against the agent. *Id.*

34. If a factor sell, *bona fide*, the goods of his principal for a valuable consideration, by assigning over the bill of lading, the sale is valid against the principal. But such a sale is not valid, unless the bill of lading for the goods has been received by the factor. *Walter et al. v. Ross et al.* 2 Wash. C. C. R. 282.

35. The defendants sold goods consigned to them by the plaintiff, under a *del credere* commission, and received in payment, for part of the sales, the bill of exchange of W. They were authorized by the plaintiff to remit in bills, and with the other proceeds of the sales, they purchased a bill drawn by I. Both bills were protested.

The Court held the defendants liable for W.'s bill, it having been received in payment for a debt guarantied by them, but not for the bill drawn by I. which was remitted according to order. *Muller v. Bohlers*, 2 Wash. C. C. R. 378.

36. To constitute a lien by a factor for his balance, possession of the goods, and a right in the principal to the property on which the lien is to operate, are necessary. *Ryberg v. Snell*, 2 Wash. C. C. R. 403.

37. If an agent or factor sell the goods of his principal, and has not received payment, or having received the same, invests the proceeds in property for the use of his principal, or marks and puts it away, the principal has a right thereto, and is entitled to the profits thereon, against the agent or his general creditors. *Aliter*, if the agent applies the money to his own use, and charges himself with it in account. *Hourquebie et al. v. Girard*, 2 Wash. C. C. R. 212.

38. Where an agent abroad is directed not to sell for less than the first cost and charges, and an invoice accompanies the letter, stating the prices of the articles, and the amount of the charges on the shipments, the price stated in the invoice is the maximum by which the agent is to be governed. He has nothing to do with the actual cost of the articles. *Lorraine v. Cartwright*, 3 Wash. C. C. R. 151.

39. Goods sold, *bona fide*, while at sea, by assignment of the bill of lading, the right of the principal to stop *in transitu* ceases. *Walter v. Ross*, 2 Wash. C. C. R. 282.

FRAUDS.

I. *Frauds at Common Law, and under the statutes 13 Eliz. c. 5. and 27 Eliz. c. 4.*

II. *Statute of Frauds, 29 Car. II.*

FRAUDS I.

Frauds at Common Law, and under the statutes 13 Eliz. c. 5. and 27 Eliz. c. 4.

1. The statute 13 Eliz. c. 5. avoids all conveyances not deemed valuable in law, as against *previous* creditors; but not as against subsequent creditors, unless made with a fraudulent intent. *Sexton v. Wheaton*, 8 Wheat. 229. 242.

2. Deeds which are absolutely void cannot be the foundation of title; and a *cestui que trust*, cannot claim under a deed fraudulently obtained by his trustee or agent, acting by his authority. *Brooks v. Marbury*, 11 Wheat. 78. 90.

3. Cases where deeds have been set aside upon the ground of fraud in the grantor, although the *cestui que trust* was innocent of the fraud, are all cases where the third person affected by the fraud claimed as a volunteer, and was in some measure connected with the party in the fraud. *Id.* 93.

4. Distinction as to the effect of possession not accompanying the deed, between the case where it conveys the property for the direct use of the grantee, and where it is a mere deed of trust or assignment for the benefit of creditors. *Id.* 81, 82.

5. The statute of frauds in Maryland requires written evidence of the contract, or a Court cannot decree performance. The words of the statute are "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." *Barry v. Coombe*, 1 *Peters*, 650.

6. A note or memorandum in writing of the agreement is sufficient under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, or the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A Court of Equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c. *Id.* 650.

7. An examination of the cases will show that Courts of Equity are not particular with regard to the direct and immediate purpose for which the written evidence of the contract was created. It is *written evidence* which the statute requires; and a note or letter, and even in one case a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of that statute. *Id.* 651.

8. Where the defendant made, in his own handwriting, a statement of a settlement, in the form of an account between himself *as debtor*, and the complainant *as creditor*, signed at the beginning with the defendant's name in his own handwriting, and at the foot with the complainant's name in his handwriting, in which statement a balance was set down as due by him to the complainant in the words following: "By my purchase of your half E. B. wharf and premises this day agreed upon between us, \$7578.63;" held, that this memorandum was sufficient under the statute of frauds of Maryland to admit of a decree for specific performance of the sale of the estate alluded to; other circumstances appearing in evidence to identify the particular property designated by "your $\frac{1}{2}$ E. B. wharf and premises." *Id.* 651.

9. Without undertaking to suggest, whether in any case the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only *prima facie*, a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. *Conard v. The Atlantic Insurance Company*, 1 *Peters*, 449.

10. A grant or assignment of goods is good, as between the parties without actual delivery; but as to creditors, the continuance of the grantor's possession is considered as an evidence of fraud; or rather in the more modern authorities, as in itself a fraud, which avoids the transaction. An exception is, when the grantor's possession is consistent with the deed, or the property conveyed is abroad and incapable of delivery. *Meeker v. Wilson*, 1 *Gallie*, 419.

11. Where the property is out of the country at the time of the transfer, possession must be taken within a reasonable time after its delivery, or the grant will be held fraudulent. *Id.*

12. If goods are sold by the vendee, who is then insolvent, but uses no device or fraud to deceive the vendor, and afterwards and before the assignment of the goods, the vendee dies, and his estate is represented insolvent, and the goods are afterwards sent by the vendor without knowledge of the facts, and arrive and are taken possession of by the administrators of the vendee, the vendor cannot reclaim the property or its proceeds upon the ground of the insolvency. *Quære*, how it

would be if there was a fraudulent representation of solvency, or a fraudulent suppression of insolvency. *Conyers v. Ennis*, 2 *Mason*, 236.

13. Where a conveyance has been made with the meditated intent to defraud creditors, it shall not be permitted to stand as security in the hands of the grantee for advances made on account of such conveyance to the grantor. *Bean v. Smith*, 2 *Mason*, 252.

14. A *bona fide* purchaser without notice from a grantee, to whom property has been conveyed to defraud creditors, is entitled to hold the same against the creditors of the grantor. *Id.*

15. Notwithstanding a judgment, the Court will, where the judgment creditor asks relief against a fraudulent conveyance, look into the original consideration, and give the creditor only what on the whole appears due to him. *Id.*

16. A *bona fide* purchaser for a valuable consideration, without notice of any fraud in the grant to his vendor shall hold the estate against the original grantor and his heirs. *Dexter v. Harris*, 2 *Mason*, 521.

17. A voluntary conveyance or a conveyance in fraud of the law, is not a nullity, but binds parties and privies. *Randall v. Phillips*, 3 *Mason*, 378.

18. A ratification of the proceedings of an attorney in a suit is not valid to bind the client, unless it is made with a full knowledge of the material facts. *Williams v. Reed*, 3 *Mason*, 405.

19. An attorney is bound to disclose to his client, if he has any adverse retainer, which may affect his own judgment or his client's interest. But the concealment of the fact is not a necessary presumption of fraud. *Id.*

20. A conveyance is fraudulent, under the stat. 13 Eliz. ch. 5, when the same is voluntarily made by the owner of the land, if land be conveyed, the grantor being indebted at the time it was executed; the conveyance must be made with intent to delay, hinder, and defraud creditors or others. *Gilmore v. North American Land Company*, 1 *Peters' C. C. R.* 461.

21. In an action for damages for a breach of contract, no evidence of fraud is admissible, and if, from evidence given in the course of the cause, the jury should be disposed to infer fraud, they should not permit it to influence their verdict. *Williams et al. v. Consequa*, 1 *Peters' C. C. R.* 302.

22. Fraud in procuring insurance to be effected is an answer to an action for a return of premium, not from any merit in the defendant, which justifies him in retaining money, which *ex æquo et bono*, is not his, but from the demerit of the plaintiff, which excludes him from the aid of a Court, to draw it out of the defendants' hands. *Schwartz v. United States Ins. Co.* 3 *Wash. C. C. R.* 170.

FRAUDS II.

Statute of Frauds, 29 Car. II.

23. The statute of frauds of New-York is a transcript on this subject of the statute 29 Charles 2d, ch. 3. It declares, "that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing and signed by the party, or by any one by him authorized." The terms "collateral" or "original" promise do not occur in the statute, and have been introduced by Courts of Law to explain its objects and expound its true interpretation. *D'Wolf v. Rabaud et al.* 1 *Peters*, 499.

24. Whether by the true intent of the statute of frauds it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties; or whether it was confined to cases, where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation.

But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination ; at least in those States where the English authorities have been fully recognized and adopted in practice. *Id.* 499.

25. If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressly upon the understanding that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. The contract of B to repay the money, is not co-incident with, nor the same contract with C to do the act. Each is an original promise ; though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of either B or C, but upon the promise of both, *diverso intuitu*, and each becomes liable to A, not upon a joint, but a several original undertaking. Each is a direct original promise, founded upon the same consideration. *Id.* 500.

26. The case of *Wain v. Watters*, (5 *East*. 10,) was the first case which settled the point, that it was necessary in order to escape from the statute of frauds, that the agreement should contain the consideration for the promise as well as the promise itself. If it contain it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. This case has been adopted, to a limited extent, by the Courts of New-York into its jurisprudence, as a sound construction of the statute. *Id.* 501.

GUARANTY.

- I. *Construction of a Guaranty.*
- II. *Effects of a Guaranty.*
- III. *Fraudulent misrepresentation of the credit of a third person.*

GUARANTY I.

Construction of a Guaranty.

1. The following letter of guaranty—

“ *Baltimore*, 17th Nov. 1803.

“Capt. Charles Drummond,

“ Dear Sir :—My son William having mentioned to me, that, in consequence of your esteem and friendship for him, you had caused and placed *property of yours and your brother's* in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together ; on my part, I think properly to guaranty to you the conduct of my son, and shall hold myself liable, and do hold myself liable for the faithful discharge of all his engagements to you, both now and in future, (signed) Geo. Prestman”—will extend to a partnership debt incurred by William P. to Charles Drummond and Richard, his brother, it being proved that the transactions to which the letter related were with them as partners, and that no other brother of the said Charles was interested therein. *Drummond v. Prestman*, 12 *Wheat*. 515.

2. In such a case, the record of a judgment confessed by the principal, William P. to Richard D., ~~as~~ surviving partner of Charles and Richard D., for the amount of the debt by William P. to the partnership firm, was held to be admissible in evi-

dence, *inter alia*, to charge the guaranty, George P., under his letter of guaranty. *Id.* 519.

3. Upon a letter containing this clause ; "The object of the present letter is to request you, if convenient, to furnish them (the person on whose account the letter was given, who were partners) with any sum they may want, as far as fifty thousand dollars : say fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it ; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount." Held, that this was not an absolute original undertaking, but a guaranty ; that it covered advances only to the persons on whose account it was given while partners, and in partnership account, and could not be applied to cover advances to either of the partners separately, on his separate account ; that the authority of the guaranty was revoked by a dissolution of the partnership, and no subsequent advances made by the party after a full notice of such dissolution were within the reach of the guaranty ; that the letter did not import to be a continuing guaranty for money advanced *toties quoties* from time to time, to the amount of fifty thousand dollars, but for a single advance of money to that amount ; and that when advances were made to fifty thousand dollars, no subsequent advances were within the guaranty ; although at the time of such farther advances, the sum actually advanced had been reduced below fifty thousand dollars, by reimbursements of the debtors. *Cremer v. Higginson*, 1 *Mason*, 323.

4. A guaranty of the notes of A cannot be applied as a quantity of the notes of A and B. *Russell v. Perkins*, 1 *Mason*, 368.

5. Upon a guaranty to the plaintiff of all notes of A., which he should endorse to the amount of \$10,000, the plaintiff endorsed notes of A to the stipulated amount at several banks ; and when the notes became due, they were taken up at the banks, and new notes, signed by A and B his partner, and endorsed, were received by the banks in their stead. It was held that the guaranty did not apply to the new notes ; and that, by such substitution, the old notes were extinguished. *Id.*

GUARANTY II.

Effects of a guaranty.

6. When money is advanced to a partnership under a guaranty, and the partnership is dissolved, and the debt is then carried at the request of the debtors to their separate accounts, according to their proportion of interest in the partnership ; and the creditor gives the partners separately a credit for proportion, and discharges the partnership account by carrying it to such separate account, and no notice thereof is given to the guarantor, the latter is discharged from all responsibility. *Cremer v. Higginson*, 1 *Mason*, 322.

7. If upon a letter of guaranty addressed to a particular person, advances are made upon the faith of the guaranty, it is the duty of the person so making the advances, to give notice thereof within a reasonable time to the guarantor, otherwise he will be discharged from all liability for such advances. *Id.*

8. Of the effect of laches in giving notice under a guaranty. *Russell v. Perkins*, 1 *Mason*, 368.

9. One who has become surety for another, cannot recover the amount of his responsibility, without showing that he had paid it, before action brought. *Pegoro v. French*, 1 *Wash. C. C. R.* 278.

GUARANTY III.

Fraudulent misrepresentation of the credit of a third person.

10. In an action for a false affirmation of the credit of another, the action is not sustained, if the representation was in substance true, according to the party's knowledge and belief. The gist of such an action is fraud. *Tappan v. Darling*, 3 *Mason*, 101.

INFANCY.

1. A father is not of course, upon a *habeas corpus*, entitled to the custody of his infant child, if brought into Court, but the Court will exercise its discretion on the subject, and place the infant where it will be most for its benefit. *United States v. Greene*, 3 *Mason*, 482.

INSURANCE.

- I. *Seaworthiness, and competency of the ship to perform the voyage.*
- II. *Risks or perils insured against:* (A) *What risks are within the policy.* (B) *What risks are excluded by the common memorandum.*
- III. *Policy:* (A) *Party effecting the policy and description of the person and interest of the insured.* (B) *Mode of effecting, cancelling, and altering, and of correcting mistakes in the policy.* (D) *Valued or open policy—General construction of the policy.*
- IV. *Warranty:* (A) *Warranty of neutrality.* (B) *Warranty against illicit and contraband trade.*
- V. *Representation and concealment.*
- VI. *Deviation.*
- VII. *Loss:* (A) *By capture, or arrest and detention.* (B) *By barratry.*
- VIII. *Abandonment:* (A) *Upon capture or arrest.* (B) *When and how the abandonment must be made.* (C) *Effect of an abandonment.*

INSURANCE I.

Seaworthiness, and competency of the ship to perform the voyage.

1. Under a policy containing the following clause: "And lastly, it is agreed that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy," and it was found by the jury that the vessel was seaworthy at the time of the commencement of the risk, and when she sailed on the voyage insured: *Held*, that proof, by a regular survey, of unsoundness at any subsequent period of the voyage, discharged the underwriters. *Dorr v. The Pacific Ins. Co.* 7 *Wheat*. 581.

2. An exemplification of a condemnation of the vessel in a foreign Court of Vice Admiralty, reciting the certificate of surveyors, that the vessel was unworthy of being repaired, and unsafe and unfit ever to go to sea again, and produced in evidence by the insured to prove the loss, is a "regular survey" in the language of the above clause. *Id.* 581.

3. But the survey must correspond with the contract, and if the vessel be declared unseaworthy for any additional cause, besides being "unsound or rotten," it is not conclusive evidence of unseaworthiness. *Id.* 581.

4. Under a policy containing the following clause: "It is declared and understood, that if the above mentioned brig, after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof;" a survey by the master and wardens of the port of New-Orleans, which was obtained at the instance of the master, who was also a part owner, and was transmitted by him to the other part owner, and by the latter laid before the underwriters as proof of the loss, stated, that the wardens "ordered one streak of plank fore and aft to be taken out, about three feet below the bends on the starboard side; and found the timber and bottom plank so much decayed, that we were unanimously of opinion her repairs would cost more than she would be worth afterwards, and that it would be for the interest of all concerned she should be condemned as unworthy of repair on that ground. We did, therefore, condemn her as not seaworthy, and as unworthy of repair; and, therefore, according to the powers vested by law in the master and wardens of this port, we do hereby order and direct the aforesaid damaged brig to be sold at public auction for the account of the insurers thereof, or whomsoever the same may concern." It was held that the survey was conclusive evidence, under the clause, to discharge the insurers from their liability for the loss. *Janney v. Columbian Ins. Co.* 10 *Wheat.* 411. 461.

5. *Quare*, How far the State legislatures may authorize the condemnation of vessels as unseaworthy, by tribunals or boards constituted under State authority, in the absence of any general regulation made by Congress, under its power of regulating commerce, or as a branch of the Admiralty jurisdiction? *Id.* 418.

6. However this may be, the above condemnation, not being specially authorized by any law of the State of Louisiana, it would not have been considered as conclusive evidence within the clause, had not the condemnation been obtained by the master, as the agent of the owners, and afterwards adopted by them as proof of the facts stated therein. *Id.*

7. Every ship must at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. *McLellan v. The Universal Insurance Company*, 1 *Peters*, 183.

8. Seaworthiness in port, or for temporary purposes, such as mere change of position in harbour, or proceeding out of port, or lying in the offing, may be one thing; and seaworthiness for the whole voyage quite another. *Id.* 184.

9. A policy on a ship, at and from a port, will attach, although the ship be at the time undergoing extensive repairs in port, so as in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. *Id.* 184.

10. What is a competent crew for the voyage; at what time such crew should be on board; what is proper pilot ground; what is the course and usage of trade, in relation to the master and crew being on board, when the ship breaks ground for the voyage? are questions of fact dependent upon nautical testimony, and within the province of the jury. *Id.* 184.

11. In a writ or a policy of insurance, where underwriters set up the defence of misrepresentation, negligent navigation, deviation, and unseaworthiness, the *onus probandi* of the three former lies on the underwriter; but unseaworthiness is to be proved by the assured, for it is a condition precedent. *Tidmarsh v. Washington F. and M. Ins. Co.* 4 *Mason*, 439.

12. Where a policy is underwritten upon a foreign vessel belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country as to equipments of vessels of that class, for the voyage on which she is destined. He must be presumed to underwrite upon the ground, that the vessel shall be seaworthy in her equipments, according to the general custom of the port, or at least of the country, to which she belongs. It would not be a just or safe rule in all cases to take that standard of seaworthiness, exclusively, which prevails in the port or country, where the insurance is made. *Tidmarsh v. Washington Ins. Co.* 4 *Mason*, 439.

13. The record of condemnation of a vessel, in a Court of Vice-Admiralty, is not evidence *per se*. The seal does not prove itself, but must be proved by a witness who knows it; or the handwriting of the judge or clerk must be proved by a witness who knows it; or that it is an examined copy. The certificate of the American Consul is not sufficient to authenticate it. *Catlett v. Pacific Ins. Co.*, 1 Paine, 594.

14. The testimony of the captain that a survey was held on the vessel, and that the surveyors reported that she could not be repaired but at too great an expense, and that she was thereupon condemned on his application, although not evidence of these proceedings, was held to be evidence that he coincided with the surveyors in opinion. *Id.*

15. Where a warrant of survey was issued, and a report made thereon, that the vessel was unfit to perform the voyage, and the vessel and cargo were ordered to be sold; the captain cannot be admitted as a witness to prove the condition of the vessel at the time of the survey, and that she was unfit for the voyage. The proceeding was judicial, and the warrant and report must be produced; but the facts contained in the report may be proved by other evidence. *Robinson v. Clifford*, 2 Wash. C. C. R. 1.

16. A certificate of the Registrar of the Vice-Admiralty Court was produced, which stated that the warrant was lost. The certificate is not evidence, but the fact of the loss must be proved under a commission. *Id.*

17. If a vessel was not seaworthy when the risk insured commenced, and therefore neither party bound by the contract of the insurance, the premium, if paid, could not be retained. *Scriba v. Ins. Co. of North America*, 2 Wash. C. C. R. 107.

18. The condemnation of a vessel, upon a report of the surveyors, that many of her timbers were unsound and rotten, and that in her strained and shattered condition, and from the want of proper docks at the place for repairing her, her repairs would cost more than she was worth; is not a condemnation, which will excuse the underwriters from liability under the clause in the policy which declares, that if the vessel should be condemned as unsound or rotten, the underwriters should not be liable. *Watson et al. v. Ins. Co. North America*, 2 Wash. C. C. R. 152.

19. Although the unseaworthiness of the vessel, occasioned by want of men, at the time the risk commences, may not vacate the policy, provided she is seaworthy when the voyage commences; yet she cannot go out of her course, after the commencement of the voyage, to supply such want. *Cruder v. Pennsylvania Ins. Co.* 2 Wash. C. C. R. 339. *Et vide S. C.* 2 Wash. C. C. R. 262.

20. It is sufficient, on a question of seaworthiness, if the vessel was fit to perform the voyage insured, as to ordinary perils—the underwriters are bound as to extraordinary perils. *Watson et al. v. Ins. Co. North America*, 2 Wash. C. C. R. 481.

31. If the insured lay a rational ground for the disability of the vessel, by proving severe gales during the voyage, and seaworthiness on the preceding voyage, the burthen of the proof of the want of seaworthiness lies on the insurer. *Aliter*, when a disability happens from stress of weather, without any sufficient cause. *Id.*

INSURANCE II.

Risks or perils insured against: (A) *What risks are within the policy.*
(B) *What risks are excluded by the common memorandum.*

(A) *What risks are within the policy.*

22. A policy was underwritten "1000 dollars on brig *Union*, and 4000 dollars on effects on board said brig from *Salem* to port or ports in the *West Indies*, one or more times for the purpose of selling her outward and procuring a return cargo, and at and from thence to her port of discharge in the *United States*." The memorandum for insurance contained this clause: "*The Union is bound to Kingston, Ja.*"

matca; if not allowed to sell there, will proceed to Cuba." At the time of the insurance both parties supposed the port of Kingston open to American vessels under a proclamation of the governor; and neither contemplated any illicit trade. The *Union* went to Kingston, supposing the port was open, and was there seized and condemned for the illicit trade. Held, that the underwriters were not liable for the loss; that the omitted clause, if inserted in the policy, would not have altered the nature of the insurance, or liability of the underwriters. Held, also, that the omitted clause was not in the contemplation of both parties a part of the contract to be inserted in the policy; but was a representation of a fact. *Andrews v. Essex Ins. Co.* 3 *Mason*, 6.

23. If the loss of the vessel arose from the ordinary circumstances of a voyage, or from sea damage, or wear and tear, which, without the action of any extraordinary causes, was to be expected, the insurer is not liable. But if it happened in consequence of the violence of the winds and waves, running on rocks, or the like, these are perils against which the insurer agrees to indemnify. *Coles v. Marine Ins. Co.* 3 *Wash. C. C. R.* 159.

24. It is not sufficient for the assured to prove that there were storms during the voyage, unless he can fairly trace the injury sustained to their influence. *Id.*

(B) *What risks are excluded by the common memorandum.*

25. In an insurance on "cargo" composed principally of lemons and oranges, if the whole of the oranges are lost in the voyage by perils insured against, and the lemons are saved and arrive, the underwriter is not liable for the loss of the oranges under the usual memorandum, which warrants the underwriters free from particular average on "fruit," &c. *Humphrey v. Union Insurance Company*, 3 *Mason*, 429.

26. As to memorandum articles, the insurer agrees to pay for a total loss only; and if the property arrive at the port of delivery, reduced in quantity, or in value, to any amount, the loss cannot be said to be total; and the insured cannot treat it as a total loss, or demand indemnity for a partial loss. *Marean v. United States Ins. Co.*, 3 *Wash. C. C. R.* 257.

INSURANCE III.

Policy. (A) *Party effecting the policy, and description of the person and interest of the insured.* (B) *Mode of effecting, cancelling, and altering, and of correcting mistakes in the policy.* (D) *Valued or open policy; general construction of the policy.*

(A) *Party effecting the policy, and description of the person and interest of the insured.*

27. An insurance broker is entitled to a lien on the policy for premiums paid by him on account of his principal; and although he parts with the possession, if the policy afterwards comes into his hands again, his lien is revived, unless the manner of his parting with it manifests his intention to abandon the lien. In such a case, an intermediate assignee takes *cum onere*. *Spring v. S. C. Ins. Co.* 8 *Wheat*. 268. 286.

28. But in the case of other liens acquired on the policy, if it be assigned *bona fide*, for a valuable consideration, while out of the possession of the person acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee. *Id.* 287.

29. A policy "for whom it may concern" will in ordinary cases cover belligerent property. *Buck and Hedrick v. The Chesapeake Insurance Company*, 1 Peters, 160.

30. The term *interest*, as used in application to the right to insure, does not necessarily imply *property* in the subject of insurance. *Id.* 163.

31. A policy "for whom it may concern" will cover the whole cargo, though the assured had only the legal, without the equitable interest, in part, and a legal and equitable interest in the residue; and it is competent for him to recover the whole in his own name. *Id.* 164.

32. L. and P. at the time of obtaining an insurance against loss by fire, were entitled to one third of the property by deed, and to the remaining two thirds as mortgagees; but one moiety of the whole was held under an agreement which had not been complied with, and which purported on its face to be void if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it. L. and P. had an insurable interest in the property. *Columbian Ins. Co. v. Lawrence*, 2 Peters, 25.

33. That an equitable interest may be insured is admitted; and no obvious reason exists to exclude an interest held under an executory contract. While the contract subsists, the person claiming under it has, undoubtedly, a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is equivalent, and is still valuable to him. The embarrassments of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract; and the contingency, that his title may be defeated by subsequent events, does not prevent this loss. *Id.*

34. In a policy at and from a port, the construction of it, as to the time when the policy attaches, depends on circumstances. If the vessel be in a foreign port, in the course of a voyage, it attaches from her first arrival there. If in a domestic port, then from the date of the policy. If the vessel has been long lying in port, without reference to any particular voyage, then it attaches from the time preparations are begun to be made for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until after his ownership commences. *Seamans v. Loring*, 1 Mason, 128.

35. If a policy be for A. B. or whom it may concern, and made by an agent without any warrant or representation of national character, it will cover the interest of any person, whether an American or foreigner, who has authorized the insurance. *Id.*

36. By a policy on vessel and cargo, a party having a lien for advances, or a special ownership and possession, may protect his interest in the vessel and cargo, to the extent of his advances and lien. *Id.*

37. If a party intends to insure a special or equitable ownership in a ship, he must give notice to the underwriter; a common policy on a ship covers only the legal ownership. *Ohl v. The Eagle Ins. Co.*, 4 Mason, 172.

38. If a policy of insurance is underwritten on a ship, the assured cannot set up a parol title to the whole of the ship, where the ship's papers on the voyage prove a joint ownership in himself and the master. In such case he can only recover for his moiety, in case of loss. *Ohl v. The Eagle Ins. Co.* 4 Mason, 172.

39. The plaintiffs purchased separately each a moiety of the cargo, which was specie, and instructed their agents to get it insured on their joint accounts. The agent effected the insurance, but the policy was expressed to be on account of *owners*: afterwards one of the plaintiffs transferred half his share to the person who was to go in the vessel as supercargo. *Held*, that the term "owners" was descriptive of the persons intended to be insured, and referring to matters out of the policy, was open to explanation by extrinsic proof. *Catlett v. Pacific Ins. Co.* 1 Paine 594.

40. As the underwriters understood, when they made the insurance, that it was on account of the plaintiffs only, it was held that they could not set up that the supercargo became an owner before the commencement of the risk. *Id.*

41. The bill of lading on its face, and the other papers showed that the interest of the three owners, after shipment, was joint. But there was an endorsement on the bill of lading, stating that one half the cargo was the property of one of the plaintiffs, and the other half the property of the other plaintiff and the supercargo. *Held*, that the endorsement was intended only to show the extent of each owner's interest, and that the separate purchase of the cargo, together with the endorsement, did not prove that their interests were several. *Id.*

42. Before the end of the voyage it was broken up, and the insured abandoned on learning the fact. The instructions to the master and supercargo, showed that the rights and duties of the latter, as supercargo, were not to commence until the end of the voyage. On the loss of the voyage the master delivered the specie to the agent of the supercargo, and it was invested in cotton. *Held*, that as the supercargo was not interested in the policy, his acts did not bind the other joint owners, and that his capacity of supercargo suspended whatever powers he might have had as partner, and that the investment by him of the specie, was as agent for the underwriters, and did not constitute an act of ownership, so as to waive the abandonment. *Id.*

43. H. S. at the request and for the use of the plaintiff, effected insurance on five hogsheads of sugar, on board *The Brothers*, and on ten hogsheads of sugar on board *The Sisters*; and in describing the same, by the supposed marks, a mistake was committed; but the intention to insure the quantity of sugar, according to his letter of instructions, was declared to the insurance broker. The property of the plaintiff was proved to be on board. The mistake in the marks was declared not to be material. *Quære*, if the assured had other sugars on board, and the claim had been for a partial loss? *Ruan v. Gardner*, 1 Wash. C. C. R. 145.

44. Witnesses cannot be examined to prove a custom, that when insurance is made on goods, with a particular mark; those goods, so marked, must be on board, in order to entitle the assured to recover. *Id.*

45. Action on a policy of insurance, on the cargo of a vessel, in which the interest of the assured was that of a surety for the payment of the value of the same, in case of its condemnation by a Court of Appeals in Spain, the cargo having been delivered to him for his indemnity. This is an insurable interest, and may be covered by an insurance on the cargo, without the particular circumstances of the case having been communicated to the underwriters. *Russel v. Union Ins. Co.* 1 Wash. C. C. R. 409.

46. The restitution of the property to the original owners, and thus taking it out of the possession of the surety, and depriving him of his means of indemnity, was a loss by one of the perils against which the plaintiff had insured, and he was at liberty to abandon. *Id.*

(B) Mode of effecting, cancelling, and altering, and of correcting mistakes in the policy.

47. A memorandum endorsed on a policy, if there never was a subject upon which the policy acted, will not constitute a contract. *Scriba v. Ins. Co. of North America*, 2 Wash. C. C. R. 107.

48. No precise form of words is required to raise up a contract of insurance; and if the words used express it, with the intention of the parties, it will be sufficient. *Id.*

49. Where parties to a contract of insurance, ignorant of the facts, made an agreement by a memorandum on the policy, which was intended as an indulgence to the assured, the mistake will not prejudice either of them. *Id.*

(D) *Valued or open policy—General construction of the policy.*

50. A policy for 10,000 dollars, upon a voyage "at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge, in the United States, upon all lawful goods and merchandise, laden or to be laden on board the ship, &c. beginning the adventure upon the said goods and merchandise, from the landing at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c. and the United States aforesaid;" is an insurance upon every successive cargo taken on board in the course of the voyage out and home, so as to cover the risk of a return cargo, the proceeds of the sales of the outward cargo. *Columbian Ins. Co. v. Callett*, 12 *Wheat.* 383.

51. Such a policy covers an insurance of 10,000 dollars during the whole voyage out and home, so long as the assured has that amount of property on board, without regard to the fact of a portion of the original cargo having been safely landed at an intermediate port before the loss. *Id.* 394, 395.

52. By the usual clause in policies as to prior insurances, the underwriter is exonerated, if prior insurances to the full value of the vessel and cargo, have been actually made by the assured on the same voyage, and in full force at the time, although by a subsequent agreement, between the assured and such prior underwriters, before the risk is commenced, the prior policies are cancelled. *Seamans v. Loring*, 1 *Mason*, 128.

53. If in a policy "at and from," the insured unreasonably delay to commence the risk, or the voyage, the underwriter is discharged. It amounts to a non-inception of the voyage insured. *Id.*

54. The actual cost of the repairs at its true value, and not the cost estimated at so much per *mil rea* in a depreciated currency, is the rule by which the underwriter is to pay for the repairs. *Humphrey v. Union Ins. Co.* 3 *Mason*, 429.

55. If two policies bear the same date, the parties, to entitle themselves to an exoneration from payment of a loss, under the common clause, as to insurance by prior policies, may show the actual time of execution of each policy, and the policy first executed, if it covers the whole interest, is alone to bear the loss. *Potter v. Marine Ins. Co.* 2 *Mason*, 475.

56. Where two policies are *concurrently* executed, the operation of the priority clause is excluded, and the assured may recover his whole loss upon either policy; and the other underwriters are liable only for contribution. *Id.*

57. In an open policy the plaintiff must prove his interest, and the value of his property, or he cannot recover. The bill of lading of the outward cargo, is no proof of the interest of the plaintiff in the homeward cargo. *Beale v. Pettit et al.* 1 *Wash. C. C. R.* 241.

58. The foundation of all insurances, unless of the wager kind, is the *real value* of the thing insured. In a valued policy the parties agree upon the value; in an open policy, the assured is bound to prove it. The prime or invoice cost, may, in most cases, be, *prima facie*, a very proper criterion of value, but it is not conclusive. The actual value should be ascertained and determined, and this may vary from the invoice, or prime cost; and, whatever the same may be, the assurers are bound to pay it in an open policy. *Snell et al. v. Delaware Ins. Co.* 1 *Wash. C. C. R.* 509.

59. In an action on two policies of insurance, one a valued policy on the vessel, the other an open policy on the cargo, on a voyage from New-York to Gibraltar, the vessel was captured, and carried into Algesiras; and there, although the cargo was not condemned, as it was not permitted to the vessel to sail with it, unless security was given that it would not be carried to a British port in the Mediterranean, it was sold by the supra-cargo; and the vessel, which had not been detained with a view to her condemnation, sailed for New-York, with a cargo on freight, and was lost; it is not necessary to disclose to the underwriters on the cargo, the particular language of the bills of lading; and if they are general, so as to comprehend the

port to which insurance is made, it is sufficient. *Hurtin v. Phoenix Ins. Co. 1 Wash. C. C. R. 400.*

60. The seizure and carrying into Algeiras, and the prohibition to carry the cargo away without security, was a complete destruction of the voyage, and authorized an abandonment of the cargo. *Id.*

61. The sale of the cargo by the supra-cargo, if he acted for the interests of all concerned, was proper; and he had a right thereby to convert a partial into a total loss. *Id.*

62. The vessel not having been detained with a view to condemnation, and the inhibition of exportation of the cargo, but upon security, not affecting her, the assured had no right to recover for a total loss. *Id.*

63. The assured not having abandoned the vessel at the time he abandoned the cargo, and having at that time refused to do so, his right to make the same is gone, and cannot be regained. *Id.*

64. The expenses incurred by the detention of the vessel at Algeiras, are subjects of general average, but her repairs are entirely chargeable to the vessel, the cargo having been previously landed. All repairs made necessary by any of the risks insured against, must be paid by the underwriters. *Id.*

65. Effect of the memorandum at the foot of the policy of insurance. *Hogan v. Dalnoure Ins. Co. 1 Wash. C. C. R. 419.*

66. If it appear that the terms of the order had been departed from in a policy of insurance, by fraud or mistake, the Court would consider the order as containing the contract between the parties; as where it materially varied from the policy; as if the risk stated in the policy be *from* such a place, instead of *at* and *from* such a place; or if it contain a warranty not authorized by the order. In such cases the variance itself, unless contradicted by proof, would be evidence of mistake. But in such cases the order could only be resorted to so far as it varied from the policy, and in all respects the policy would govern. *Delaware Ins. Co. v. Hogan, 2 Wash. C. C. R. 4.*

67. The policy of insurance, without other proof of the payment of the premium, is not evidence of its payment. *Mellick et al. v. Peterson, 2 Wash. C. C. R. 31.*

68. Where the *written* clause in a policy is inconsistent with the *printed parts* of it, the former will be deemed and taken as the contract of the parties. *Coster v. Phoenix Ins. Co. 2 Wash. C. C. R. 51.*

69. A policy was underwritten by the Philadelphia Insurance Company, on goods on board the Ann, at and from Baltimore to Jeremie, and at and from thence to Baltimore, 12,000 dollars, valued. After the arrival of the Ann in the West Indies, the owner was informed, by a letter from the captain, that the return cargo would be 112,000 pounds of coffee; and insurance was made by the defendants, stating the cargo at 125,000 pounds of coffee, valued at twenty-two cents per pound, from which was to be deducted 12,000 dollars, insured in the Philadelphia Insurance Company. A total loss took place, and the Philadelphia Insurance Company paid the loss, by compromise, waiving an abandonment.

The policy underwritten by the Philadelphia Insurance Company, must be considered as *open* on the homeward cargo. *McKim v. Phoenix Ins. Co. 2 Wash. C. C. R. 89.*

70. The policy underwritten by the defendants does not bind them to cover the whole cargo, valued at twenty-two cents per pound, deducting the sum previously insured. *Id.*

71. By the policy made with the Philadelphia Insurance Company, the underwriters had in case of loss a right to as much of the cargo as would, at prime cost, amount to 12,000 dollars; and the second policy, in respect thereto, was void. *Id.*

72. The waiver of an abandonment by the Philadelphia Insurance Company, did not affect the relations between the plaintiff and the defendants. *Id.*

73. If the written and printed clauses of a policy of insurance can be made to stand together, and both be available, such an exposition of them should be adopted. *Seton v. Delaware Ins. Co. 2 Wash. C. C. R. 175.*

74. The plaintiffs effected insurance in New-York, on the Hope, from Gibraltar to New-York, to the amount of four thousand dollars, valuing her at that sum; and they afterwards effected insurance on her with the defendants, to the amount of four thousand dollars, valuing her at six thousand dollars; without notice to the defendants of the prior insurance. A partial loss occurred, and the plaintiffs claimed to charge a partial loss upon the whole amount insured by the defendants in the second policy.

The defendants are liable for as much of the agreed value of the Hope, as is not covered by the prior insurance, being to the extent of two thousand dollars. *Murray et al. v. Ins. Co. of Pennsylvania*, 2 Wash. C. C. R. 186.

75. It was not necessary to give notice of the first insurance to the defendants. *Id.*

76. In case of a total loss, where two insurances have been made, the assured may abandon to the second underwriters, and take from them so much as the second policy covers. *Id.*

77. In case of a total loss, the insurer loses precisely as much as the property insured was worth at the time and place of shipping it, the expenses of lading included. What the property cost the assured, is not the rule of value, in adjusting the loss; but what it is worth, or would sell for, when shipped. *Carson et al. v. Marine Ins. Co.* 2 Wash. C. C. R. 468.

78. The invoice price is not a proper test of value. *Id.*

79. The rule for fixing the value of a vessel which has been lost, and which has been insured in an open policy, is to take the sum she was worth at the time of her departure, including certain expenses. *Id.*

80. The alleged custom in Philadelphia, to strike off one third of the gross freight, for charges, and to pay two thirds only to the assured, in a policy on freight, where a total loss has occurred, is unreasonable, and is in direct opposition to the terms of the policy. *McGregor v. Ins. Co. of Pennsylvania*, 2 Wash. C. C. R. 39.

81. The plaintiffs insured \$12,000 on the Anna Maria, from Cadiz to Antwerp, by a valued policy; and the vessel having put into Gibraltar in distress, the captain executed a bottomry bond, which was dated a few days before the policy was made. The jury found the real value of the Anna Maria to be \$15,000, and left to the Court the question, whether the amount of the bottomry bond should be deducted from the agreed value in the policy, or the real value. The Court held that the deduction should be made from the real value, as found by the jury. *Watson et al. v. Ins. Co. of North America*, 3 Wash. C. C. R. 1.

82. The rule that if the policy once attaches, the right to the premium becomes indefeasible, is not without exceptions. *Gray v. Sims*, 3 Wash. C. C. R. 276.

83. If a contract of insurance be legal when it is made, and the performance of it is rendered illegal by a subsequent law, both parties are discharged from its obligations. In such a case the insured loses his indemnity, and the insurer his premium. *Id.*

INSURANCE IV.

Warranty. (A) *Warranty of Neutrality.* (B) *Warranty against illicit and contraband trade.*

(A) *Warranty of Neutrality.*

84. Policy of Insurance whereby the plaintiffs for whom it may concern, insured \$10,000, viz: \$2,326 on the cargo, and \$1,860 on the freight, and \$5,814 on the profits on board the brig Dick, freight valued at \$30,000, and profits at \$25,000, premium included, at and from her port or ports of loading in Europe, to, at, and from any port or ports, place or places, the risk "to continue for the term of 18 months, and to attach on merchandise or specie, both or either, warranted American property. It is understood that the assured are owners of the cargo, but the

valuation of freight and profits hereby agreed to shall be binding, whether the lading of the vessel is the property of the assured or of others, or whether at the time of the loss there shall be any cargo on board or not." The warranty extends to all the cargo put on board on which the policy was to attach. *Quare*, whether it does not apply to all the subjects insured? *Bayard v. Massachusetts Fire and Marine Ins. Co.* 4 *Mason*, 256.

85. Every warranty in a policy of insurance, whether express or implied, constitutes a condition precedent, and the assured cannot recover from the underwriters, without first averring and proving performance of such stipulations. *Craig v. United States Insurance Company.* 1 *Peters' C. C. R.* 410.

86. The register of a vessel is the only document which need be on board during a period of universal peace, in compliance with the warranty of national character. *Catlett v. Pacific Ins. Co.* 1 *Paine*, 594.

87. It is the original register which is required by law to be transmitted, on the loss of a vessel, to the Register of the Treasury to be cancelled. And it is the practice not to destroy the register after it is cancelled; it is a document required by law to be deposited in the Register's office; and a duly certified copy is legal evidence. *Id.*

88. It is a breach of warranty of neutrality, that a vessel and cargo, warranted American property, shall be navigated and claimed as Spanish property; and that all the evidence to prove the neutrality of the vessel and cargo, is concealed from the captors. *Calbreath v. Gracy*, 1 *Wash. C. C. R.* 219.

89. In case of such warranty, it is not only necessary that the cargo be in truth neutral, but also that no act of commission or of omission should be performed, to jeopardize the claim to a neutral character, whether by the owner, or by his agents. *Id.*

90. Action on a policy of insurance, dated the 27th of June, 1807, on goods on board the *Little William*, from Philadelphia to Tonningen, or Hamburg, if not blockaded; warranted American property, proof to be made here. The captain was instructed, "If you can ascertain and obtain permission to go to Hamburg from the cruising vessel at the entrance of the Eyder, you will proceed; but on no account attempt it, unless you are well assured that the blockade of the Elbe is raised." The vessel was captured by a British cruiser, six hundred miles from Tonningen, and was condemned. The captain did not deliver his letter of instructions to the captors, until some days after he had delivered the ship's papers. The vessel and cargo were condemned by Sir William Scott, as enemy's property.

The stipulation in the policy, as to the place where proof is to be made in support of the warranty, is not set aside by the sentence of a foreign Court against the neutrality, but the same may be vindicated here, notwithstanding such sentence. *Sperry v. Delaware Ins. Co.*, 2 *Wash. C. C. R.* 243.

91. The conduct of the captain, in not delivering the letter of instructions when captured, was imprudent; but was not such as should affect the assured. *Id.*

92. If the instructions to the master violated any of the rules established in the Court of Admiralty in England, although such rules were against the laws of nations, the instructions should have been communicated to the underwriters. *Id.*

93. The instructions did not violate any of these rules, the vessel being destined to Tonningen, unless she should obtain permission at the entrance of a place not blockaded, to proceed to Hamburg. *Id.*

94. The meaning of the warranty of neutrality is, that the property insured is neutral in fact, and shall be so in appearance and conduct; that the property shall belong to neutrals; that it shall be so documented as to prove its neutrality, and that no act of the insured or his agents shall be done, which can legally compromise its neutrality. *Schwartz v. Ins. Co. of North America*, 3 *Wash. C. C. R.* 117.

(B) *Warranty against illicit and contraband trade.*

95. Insurance on goods on board the Concord, at and from her port or ports, place and places of loading in Honduras, to Liverpool, warranted free from loss in consequence of, or detention on account of, any illicit or prohibited trade. The vessel was captured in the Bay of Honduras, by a British vessel, as prize, on the allegation that she was taking on board mahogany of larger dimensions than was allowed to American vessels; and while on her passage to Jamaica, she, with the capturing vessel, was lost. *Graham v. Pennsylvania Ins. Co. 2 Wash. C. C. R. 113.*

96. Privileges given to vessels to cut mahogany, under the treaties between Spain and England, in 1762 and 1783. What is the proper construction of those treaties, and of the proclamations and laws relative to the trade under them, which have been issued or ordained by the English government. *Id.*

97. When a seizure is made within the territories of a foreign government, on account of illicit trade, it cannot be said the warranty is not broken, because the seizure was not made before the vessel arrived at her port of destination, or before she had an opportunity to do some act amounting to an actual trading. *Smith et al. v. Delaware Ins Co. 3 Wash. C. C. R. 127.*

98. A warrant against *illicit or prohibited trade*, has a view to the municipal laws and ordinances of the country where the trade is to be carried on; and foreigners going there, are bound to know and to observe those laws. The warranty amounts to a stipulation, that the trade in which the insured shall engage, shall be lawful to the purpose of protecting the property insured, and that it shall not become unlawful by the misconduct or neglect of the insured. *Id.*

INSURANCE V.

Representation and concealment.

99. Insurance for 18,000 dollars on vessel valued at that sum, and 2000 dollars on freight valued at 12,000 dollars, on the ship Henry "at and from Teneriffe, and at and from thence to New-York, with liberty to stop at Matanzas; the property warranted American." The policy was executed in 1807; and in the same year another policy was made, by the same underwriters, on freight for the same voyage, to the amount of 10,000 dollars, and the property was also warranted American, but there was no liberty to stop at Matanzas. The following representation was made to the underwriters on the part of the plaintiff, who was both owner and master of the ship. "We are to clear out for New-Orleans, the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment. There will be three other persons on board, that will have the remainder of the cargo in their care. We are to stop at the Matanzas, to know if there are any men of war off the Havanna." The vessel sailed from Teneriffe on the 17th of April, 1807, with a cargo belonging to Spanish subjects, but appearing to be the property of John Paul Dumeste, a citizen of the United States, and the same person called John Paul in the representation. The cargo was shipped under a charter-party executed by the plaintiff and Dumeste, representing New Orleans as the place of destination. The ship arrived at the Havanna on the 7th of July, having put into Matanzas to avoid British cruisers, and unladed the cargo, which was there received by the Spanish owners, and the freight, amounting to 7000 dollars, paid to the plaintiff who received it, "in full of all demands for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo." At the Havanna the ship took in a new cargo, belonging to merchants in New-York, and was lost, with the greater part of the cargo, on the voyage from Havanna to New-York. An action of debt was brought on the first

policy for the value of the ship and freight. The sum demanded in the writ was 20,000 dollars, but the plaintiff limited his demand at the trial to 18,000 dollars on the ship, and 420 dollars for the freight actually earned on the voyage from Havana to New-York. *Held*, that he was entitled to recover. *Hughes v. Union Ins. Co.* 8 *Wheat.* 294. 304.

100. Where an insurance was effected after a loss had happened, though unknown to the assured, the master having omitted to communicate information to the owner, and having expressed his intention not to write to the owner, and taken measures to prevent the fact of the loss being known, for the avowed purpose of enabling the owner to effect insurance, in consequence of which information of the loss had not reached the parties at the time the policy was underwritten; *Held*, that the owner having acted with good faith, was not precluded from a recovery upon the policy on account of the fraudulent misconduct of the master. *General Interest Ins. Co. v. Ruggles*, 12 *Wheat.* 408, 8. C. 4 *Mason*, 74.

101. To affirm that "in policies for whom it may concern," there can be no undue concealment as to the parties interested in the property to be insured, is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes the inquiry. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases. *Buck & Hadrick v. The Chesapeake Insurance Company*, 1 *Peters*, 159.

102. If a party knowing that his agent is about to procure insurance for him, withholds information for the purpose of misleading the underwriter; it is a fraud which is fatal to the insurance. *M. Lanahan v. The Universal Insurance Company*, 1 *Peters*, 185.

102. Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits to do so, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void. *Id.* 185.

104. The omission to mention the time of sailing, if accidental, would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not in fact mislead; and whether fraudulent or not, is matter of fact for the jury. *Id.* 188.

105. The material ingredients of all inquiries as to how far the concealment of the time of sailing is important, are mixed up with nautical skill, information and experience; and are to be ascertained in part, upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. *Id.* 188.

106. The contract for insurance against fire, is one in which the underwriters, generally, act on the representation of the assured; and that representation ought consequently to be fair, and to omit nothing which it is material for the underwriters to know. It may not be necessary that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state if it was offered for sale; but fair dealing requires that he should state every thing which might, and probably would, influence the mind of the underwriter in forming or declining the contract. *Columbian Ins. Co. v. Lawrence*, 2 *Peters*, 25.

107. Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. Underwriters do not rely so much upon the principles as on the interest of the assured; and it would seem therefore to be always material that they should know how far this interest is engaged in guarding the property from loss. *Id.*

108. If a policy authorize a stopping at a particular port, it is not necessary for the assured to disclose that the ship will call there, although he has information of the fact. *Hubbard v. Cookidge*, 2 *Gallis*. 258.

109. The plaintiffs having stated to the underwriters, in answer to some general inquiries, "that they had no knowledge that the ship would call at the *Cape*, and knew of no motive for calling there," &c. and no further inquiries being made by the underwriters, this was not a misrepresentation, to avoid the policy. *Id.*

110. A representation as to the destination of the ship, if true at the time, and not fraudulently made, does not avoid the policy, although the destination be afterwards changed. *Id.*

111. It seems that if a vessel be described in the policy to be a prize vessel, and afterwards her national character be changed, so as to increase the risk, this discharges the underwriters. *Seamans v. Loring*, 1 *Mason*, 128.

112. If the agent in procuring insurance represents that the ship was not to sail until four days *after* another vessel, which came from the same port and had arrived, and in point of fact she sailed four days *before*, and the difference of sailing is material to the risk, the policy is void. *Baxter v. New-England Ins. Co.* 3 *Mason*, 96.

113. In a policy on a ship there is always an implied representation, that the ship's papers disclose the true legal ownership. *Old v. The Eagle Ins. Co.* 4 *Mason*, 172.

114. If a party makes a representation on the information of others, and states it, not as known to him, but merely as information, the representation is not falsified, so as to avoid the insurance, if the fact is not so, but the party has given his information truly. *Tidmarsh v. Washington Ins. Co.* 4 *Mason*, 439.

115. The agreement of insurance having been made while both parties were ignorant of the loss, and the policy having been completed and executed, although not delivered, it is valid and binding, and the plaintiff is entitled to recover, if there be no other valid objection. *Kohne v. Ins. Co. of North America*, 1 *Wash. C. C. R.* 93.

116. The omission to mention that the voyage from a second port had commenced, at the time of the insurance, if the vessel was in good order at the time of her departure from the first port, does not seem material. *Id.*

117. If a concealment that the cargo insured had been shipped at a colonial port, and had not been landed in the United States, was material to the risk, the facts ought to have been disclosed. *Id.*

118. If a foreign regulation be known only to the insurer, he must ask for information as to the facts: if known to the insured, he must disclose the same. *Id.*

119. *Quære*, If these regulations are not of general notoriety, whether the insurer or assured is bound to disclose them, unless express notice of them is proved? *Id.*

120. A concealment of facts material to the risk, and within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy. *Vale v. Phoenix Ins. Co.* 1 *Wash. C. C. R.* 283. S. P. *Kohne v. Ins. Co. of North America*, 1 *Wash. C. C. R.* 158.

121. It may be a material concealment from the underwriters, if a letter communicating the period when the voyage insured commenced, was not exhibited at the time the contract of assurance was entered into. This would certainly be so, if the vessel was out of time when the insurance was ordered. *Johnson v. Phoenix Ins. Co.* 1 *Wash. C. C. R.* 378.

122. Insurance on goods on board the *Liberty*, from Philadelphia to Charleston, lost or not lost. It was the duty of the assured, to communicate to the underwriters, a letter received by him, containing particulars of a hurricane which had occurred at Charleston after the vessel sailed; although the fact of there having been severe gales on the coast of Carolina was known to the defendants. The knowledge of the plaintiff was particular, that of the defendants was general. *Myers Moses v. Delaware Ins. Co.* 1 *Wash. C. C. R.* 386.

123. If the assured communicates to the underwriters all the information he had honestly obtained, he cannot be charged with misrepresentation or concealment, if it should, afterwards, turn out that his informant knew more than he had disclosed, or had not stated it truly. *Biays v. Union Ins. Co.* 1 Wash. C. C. R. 506.

124. If for fraudulent purposes, he avoided obtaining a full and true disclosure, the consequences would be the same, as if he had misrepresented the information given him. *Id.*

125. The assured is not bound to anticipate every possible ground of suspicion, which may, against right, weigh with the belligerent cruisers and Courts, and to communicate the circumstances; although, if against right, the belligerent Courts are in the habit of condemning property under particular circumstances, he should disclose the circumstances, if they exist, that the underwriter may know how to estimate the risk. *Marshall v. Union Ins. Co.* 2 Wash. C. C. R. 357.

126. A misrepresentation, which will avoid a policy, must not only be false, but it must be material, either in relation to the rate of premium, or as offering a false inducement to the underwriter to take the risk, when otherwise he would not have done so. If it had no influence, or ought to have had none, it cannot be said to have been material. *Clason v. Smith*, 3 Wash. C. C. R. 156.

127. The mere expression of an opinion by the assured, or an expectation as to a matter which might even imply that the party had some ground, deemed by himself sufficient, on which to build his opinion, would not amount to a material misrepresentation. It was the folly of the assurer, not to have inquired into the grounds of the opinion. *Id.*

INSURANCE VI.

Deviation.

128. Whether a delay at a particular port constitutes a deviation depends upon the usage of trade with reference to the object of selling the cargo. Where different ports are to be visited for this purpose, the owner has a right to limit the price at which the master may sell, to a reasonable extent; and a delay at a particular port, if *bona fide* made for that purpose, does not constitute a deviation, though occasioned by this restriction. *Columbian Ins. Co. v. Cattlett*, 12 Wheat. 338.

129. A vessel armed as a letter of marque, and insured as such, has no right to cruise at large for prizes, but she may chase and capture hostile vessels coming in sight, in the course of her voyage, without its being a deviation; and there is no difference in the law if the vessel be not described in the policy as a letter of marque, provided that fact be made known to the underwriter before underwriting the policy. *Haven v. Holland, 2 Mason*, 230.

130. Every vessel, whether armed or not, has a right of self-defence against hostile attacks; and the master has a large discretion on this subject. He is not bound to attempt an escape in the first instance, and only to repel an attack when made. He is on the other hand at liberty to lay to, or attack the enemy ship, or chase her, if he deem that the best means of self-defence, and not wait until a direct attack is made on his own vessel, for self-defence may then be fruitless, by his being crippled. *Id.*

131. If a vessel capture an hostile vessel in self-defence, she has a consequent right to take possession and man out the prize, for she has a right to make her victory effectual, and it will be no deviation, if thereby her own crew be not injuriously weakened. *Id.*

132. Liberty in a policy of insurance to touch at a place, does not justify trading; and trading would be a deviation, and avoid the policy. *United States v. The Paul Shearman*, 1 Peters' C. C. R. 98.

133. In an action on a policy of insurance on goods on board the ship *Maryland*, at and from New-York to the Cape of Good Hope, with liberty to proceed to, and

trade at the Isle of France, and any port or ports in the Indian seas, and at and from the ports she might go to, back to New-York; with liberty to touch and trade, as usual, on the outward and homeward voyages, for refreshments. The vessel touched at the Isle of France, thence to Trincomala, proceeded to Madras and sold part of her cargo, and went from thence to Tranquebar, where she took in goods and proceeded to Batavia; there she sold the remains of her original cargo, as well as the goods taken in at Tranquebar, and sailed from Batavia with a cargo purchased with the proceeds of her outward cargo, and of the goods taken on board at Tranquebar. After leaving Batavia, all the officers died; and before his death, the captain directed one of the seamen, who was ignorant of navigation, to take the ship to the Isle of France, and deliver her to the consul. She arrived there, and was despatched for New-York, under the command of a British subject, but was lost on the voyage. It was *held*, that the trading was within the terms of the policy—that the proceeding to the Isle of France was not a deviation—that the acts of the consul, if irregular, could not prejudice the rights of the insured. *Winthrop v. Union Ins. Co.* 2 Wash. C. C. R. 7.

134. To go out of her course to save the life of a man will not constitute a deviation. *Bond v. Brig Cera*, 2 Wash. C. C. R. 80. S. C. 2 Adm. Decis. 361.

135. The smallest deviation from the usual course of the voyage, without a justifiable necessity, discharges the underwriters, although the loss was not the immediate consequence of the deviation. *Martin v. Delaware Ins. Co.* 2 Wash. C. C. R. 254.

136. It is not an excuse for a deviation, that there was a sufficient number of hands to navigate the vessel to a port, where the necessary addition to the crew could be obtained for the whole voyage; such port not being in the course of the voyage, and the want of hands existing before the commencement of the voyage insured. The vessel should be fitted for the voyage insured at the time of her departure. *Cruder v. Pennsylvania Ins. Co.* 2 Wash. C. C. R. 339. *Et vide* S. C. 2 Wash. C. C. R. 262.

137. Insurance was effected on goods in a voyage at and from Guadaloupe to a port in France, on the Atlantic. The vessel, instead of going direct to France, stopped at Santos two or three days, which was proved to be the safest and most usual route in time of war. If the vessel went to Santos with the honest intention to avoid British cruisers, and remained there no longer than was necessary, the deviation was excusable. *Goyon v. Pleasants*, 3 Wash. C. C. R. 241.

138. A deviation is not merely the unnecessary going out of the track, or course usually taken, but it is also a departure from either the express or implied terms of the contract. *Warder et al. v. Goods, &c.* 1 Adm. Decis. 31.

139. Delays for saving of ships, goods, or mariners, producing uncommon risk, cannot be legal excuses on the part of the insured on policies as they are generally made—such delays being breaches of the implied terms of the contract, by exposing to hazards not originally counted upon, foreseen, or in the contemplation of the parties. *Id.*

140. All excuses for leaving the course or delays must be from necessity. *Id.*

INSURANCE VII.

Loss : (A) *By capture, or arrest and detention.* (B) *By barratry.*

(A) *By capture, or arrest and detention.*

141. Where the cargo, in the course of the outward voyage, and before its termination, was permanently separated from the ship by the total wreck of the latter, and the cargo, being perishable in its nature, though not injured to one half its value, it became necessary to sell it, the further prosecution of the voyage with the same ship or cargo became impracticable; *Held*, that this was a technical total loss,

on account of the breaking up of the voyage. *Columbian Ins. Co. v. Catlett*, 1: *Wheat*. 391.

142. Freight is not a charge upon the salvage of the cargo in the hands of the underwriters, whether the assured is owner of the ship or not. *Id.* 395.

143. Where a vessel was stranded, and afterwards, before abandonment, was got off without material injury, but was, in the intermediate time, sold by the master at public auction, and purchased by him; it was held that the plaintiff was not entitled to recover for a total loss. *Church v. Marine Insurance Company*, 1 *Mason*, 341.

144. A policy was underwritten on a vessel for 12 months. In the course of her voyages, during this period, she sailed from *Providence*, bound to *New-Orleans*, with a cargo on board belonging to the owner of the ship, and encountered a gale, and was compelled to cut away her masts and rigging, and to return to *New York* for repairs, where it was found that the repairs would cost more than half her value. The cargo was taken out and sold by the owners, who had insured the same. The claim was now for a total loss of the vessel, she having been abandoned to the underwriters. In adjusting the loss, it was held, that the cutting away of the masts and rigging was a general average to be borne by the ship and cargo in the same manner as if they belonged to different owners. In such a case, if the owners of the ship and cargo are different, the owner of the ship may recover the whole amount of his loss without any deduction of the general average due on the cargo. But where the ship owner is also owner of the cargo, the amount due from the cargo may be deducted from the total loss on the ship by the underwriter. *Potter v. Providence Washington Ins. Co.* 4 *Mason*, 298.

145. In an action to recover the amount of three bags of Spanish dollars, which had been taken from the vessel on the voyage, during which she was boarded by the crew of a privateer, the plaintiff must prove the loss to have occurred, by some one of the perils insured against; but a loss by embezzlement of the crew, is not included in the policy. *Hicks v. Fitzsimmons*, 1 *Wash. C. C. R.* 279.

146. Proof that possession was taken of the vessel, by a privateer under Spanish colours, and that she was carried into Porto Rico, is sufficient evidence of a total loss after three years; during which time nothing has been heard of the vessel and cargo; and to enable the assured to recover, it is not necessary to show a condemnation. *Ruan v. Gardner*, 1 *Wash. C. C. R.* 145.

147. The protest of one of the sailors of the captured vessel, made after his return to the United States, at the first port, and left with the broker of the assurers, to fix the period from which the loss was to be paid, may be given in evidence for that purpose; but it is not evidence of any fact contained in it. *Id.*

148. In an action on a policy of insurance, on goods, one of the part owners of the vessel, not interested in the insurance, may be examined to prove the loss, and other facts. *Id.*

149. A partial loss of an entire cargo, by sea damage, if amounting to more than fifty per cent. may, under circumstances, be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage be not thereby broken up, or rendered unworthy of being prosecuted. *Seton v. Delaware Ins. Co.* 2 *Wash. C. C. R.* 175.

150. It is a uniform rule, in estimating the loss upon a vessel which has never been heard of, and is therefore considered as lost, to calculate interest after twelve months and thirty days from the last period when the vessel was heard from. *Hallet et al. v. Phoenix Ins.* 2 *Wash. C. C. R.* 279.

151. Where a vessel has upon a report of a survey, under an order given by the American Consul, been sold by the captain, without a regular condemnation, the loss cannot be made total; but the assured is entitled to no more than the amount of loss actually sustained. *Cort et al. v. Delaware Ins. Co.* 2 *Wash. C. C. R.* 375.

(B) *By barratry.*

152. It is not essential to constitute barratry, that it should be to the interest of the master. *Dederer v. Delaware Ins. Co.* 2 Wash. C. C. R. 61.

153. If the act of the master were intended to benefit the owner, although mistaken, it cannot be barratry, because it was not fraudulent, or criminal. *Id.*

INSURANCE VIII.

Abandonment. (A) *Upon capture or arrest.* (C) *Effect of an abandonment.*

(A) *Upon capture or arrest.*

154. Where, in a policy of insurance, a technical total loss is asserted as the ground of recovery, the loss must be occasioned by the immediate operation of some of the perils insured against, and it is not sufficient that the voyage be abandoned for fear of the operation of the peril. *Smith v. The Universal Ins. Co.* 6 Wheat. 176.

155. The Insurers do not undertake, that the voyage shall be performed without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does begin to act upon the subject, yet if it be removed before any loss takes place, and the voyage is not thereby broken up, but is, or may be resumed, the insured cannot abandon for a total loss. *Id.*

156. Insurance on munitions of war, laden on board a neutral vessel, on a voyage from New-York, to and at a port or ports, place or places, in the Gulph of Mexico, from the Balize to Campeachy, both inclusive, and from either back to New-York, &c. with a memorandum, that the insurers should be free from any loss arising from illicit or prohibited trade. The goods insured were prohibited from being imported into the ports of New Spain, in possession of the Royalists, by the laws of Old Spain, but were permitted to be introduced into such ports as were in possession of the insurgents. The vessel and cargo arrived off a place in possession of the patriot General Mina, and the master made an agreement to sell the cargo to him, deliverable from time to time, as he should want it, at St. Ander. But before the cargo could be delivered, the vessel was chased off by Spanish armed ships, and after making several attempts to return, was compelled to proceed to the Balize for repairs; after which she again approached the coast, but found it still in possession of the Royalists, General Mina having retired into the interior. The objects of the voyage being thus defeated, the vessel returned to New York with the original cargo on board; and the insured then abandoned to the underwriters, not having before had information of the breaking up of the voyage. *Held*, that the insured were not entitled to recover as for a total loss of the voyage. *Id.*

157. Policy on ship *Argonaut* and cargo, at and from *Leghorn* to her port of discharge in the *United States*, ship sailed on her voyage, being owned at and bound to *Salem*. She was cast away, in March 1820, on a ledge of rocks, near *Portsmouth* harbour (New Hampshire,) and immediately bilged. She was in such a desperate situation, that it was nine chances out of ten that she would be totally lost and wrecked in twenty-four hours. In this situation the owners abandoned to the underwriters. There was no verbal acceptance of the abandonment, but the underwriters declined any further agency of the owners, sent their own agent to take possession of the vessel, sell her if deemed best, and act as he chose in all respects as to the vessel, but directing him not to meddle with the cargo (*specie*,) which had not been abandoned. The owners never meddled with the ship after the abandon-

ment; but the agent of the underwriters took exclusive possession, and by most extraordinary good fortune and good weather, she was got off and carried to *Portsmouth* in about a week. She was injured to about one half of her value, and the necessary repairs could not be made in a period short of *three months*, which was a longer period than the usual length of the voyage insured. After the vessel was got off, the underwriters offered to return her to the owners. They refused to receive her. The underwriters then repaired her in three months, under their own agent, and when repaired offered her again to the owners. The latter again refused to receive her; and never authorized the repairs in any shape. They adhered to their abandonment as good, and that henceforth they had nothing to do with the ship.

The Court held, *first*, that the owners had a good right to abandon under the circumstances, even if the injury was less than one half the value. *Secondly*, that in estimating that half value, there was not to be a deduction of one third, new for old, as in case of *partial loss*; that the half value which authorized an abandonment, was half the sum which the ship, if repaired, would be worth after repairs made. If the ship, when repaired, would not be worth double the amount of repairs, the owners had a right to abandon. *Thirdly*, that the underwriters had no right to take possession of the ship, either to move her or to repair her, without the consent of the owners. That these acts of taking possession, &c. after the abandonment, were, in *point of law*, an acceptance of the abandonment, since the underwriters could not be justified in them, except as owners of the property. *Fourthly*, that an abandonment, once made and accepted, is irrevocable by either party, without the assent of the other. *Peele v. The Merchants' Insurance Company*, 3 *Mason*, 27.

158. A vessel was insured from *Messina* to *Boston*. She met with disasters in the course of her voyage, put into *Lisbon* for repairs, and they were made, *exceeding half* her value. A bottomry bond was given for the amount. She proceeded on her voyage, and safely arrived. Four days before her arrival, the owner abandoned, not having previous information; subsequently, the vessel was sold under the bottomry bond. *Held*, that the loss was not total at the time of the abandonment, and the plaintiff could not recover for a total loss. *Held*, also, that in this case the underwriter was entitled to have the usual deduction on the repairs of one third new for old, as the sale of the vessel was by the default of the owner. *Humphrey v. The Union Ins. Co.* 3 *Mason*, 429.

159. In a suit *in rem* on a bottomry bond, underwriters, to whom an abandonment is made, which has not been accepted, are not admissible as claimants. *Ship Packet*, 3 *Mason*, 255.

160. *Quære*, Whether, when at the time of an offer to abandon, the property was restored; the assured can recover for a total loss? *Beale v. Pettit et al.* 1 *Wash. C. C. R.* 241.

161. Where an insurance is made upon goods and freight from New-York to Cape Francois, and if prevented entering that port, to some other port mentioned in the policy; and the vessel is prevented by a blockading squadron, from entering any one of the designated ports, and is obliged to end her voyage; it is a loss within one of the perils insured against, the voyage being completely broken up; and the insured has a right to abandon. The same principles apply to an insurance on freight, although the owner of the vessel was also owner of the cargo. *Simmons v. Union Ins. Co.* 1 *Wash. C. C. R.* 382.

162. The vessel and cargo insured, were captured as *prize*, libelled and acquitted on the 7th of July; and on appeal by the captors, the sentence was affirmed on the 9th of July, and restitution was decreed; and on the 19th of July, restitution of the property captured was actually made, except of that which had been pillaged by the captors; but at what hour of the day the same was made, was submitted to the Court. On the same day a survey was made to ascertain the amount of the spoiliations of the cargo, and on the 30th of July the vessel proceeded on her voyage. On the 17th of July, (in New-York) the plaintiff received a notice of

the capture. On the 18th, he directed his agent in Philadelphia to abandon, who did so on the 19th, informing the plaintiff thereof by mail; the mail leaving Philadelphia for New-York at twelve o'clock on the 19th of July.

The actual state of the loss, at the time of the abandonment, ought to decide the right of the assured to make the loss a total one; and it is on the reality of the loss at the time of the abandonment, its legality depends. *Marshall v. Delaware Ins. Co.* 2 Wash. C. C. R. 54.

163. The right to abandon did not depend, in this case, on the question, whether the restitution was actually made, and the property in possession of the master of the vessel. The property was in the actual possession of the master, after the decree and warrant of restitution delivered to the master. *Id.*

164. If a sufficient cause for abandonment is stated by the assured to the underwriters, when he offers to abandon, he need not communicate other or additional causes, although they were known to him; if the underwriters refuse to accept the abandonment. *Dederer v. Delaware Ins. Co.* 2 Wash. C. C. R. 61.

165. Insurance was made on the freight of the *Venus*, from Philadelphia to the Isle of France. On the voyage insured, the ship was stopped by a British ship of war, on the 16th of January, 1808, detained for a short time, and discharged, her register being endorsed "warned not to proceed to any port in the possession of his majesty's enemies." The *Venus* returned to Philadelphia on the 23d of February, 1808, and the assured claimed for a total loss. The Isle of France was not blockaded by an actual force, until after the 1st of February, 1808; but the captain of the British ship informed the master and owner of the *Venus*, that the Isle of France was blockaded, and that she would be prize, which caused the *Venus* to return to Philadelphia.

The actual existence of a blockading force, and only reasonable doubt prevailing that there is danger from it, does not justify a deviation from a voyage insured. *King v. Delaware Ins. Co.* 2 Wash. C. C. R. 300.

166. If the underwriter is to be rendered liable for a technical total loss, where none has really been sustained, the insured ought to do all in his power to prevent such loss, and he should proceed upon his voyage until the danger of an actual loss is rendered manifest. *Id.*

167. Information of the place to which a vessel is proceeding, being surrounded by hostile privateers, will not authorize the captain breaking up his voyage, from an apprehension of danger, and thus make the underwriters liable. *Id.*

168. An increase of risk, after the voyage is begun, will not excuse the insured, beyond a prudent and necessary deviation, in order to avoid it. *Id.*

169. If the assured states an insufficient reason for abandoning, he cannot, at the trial, rely upon one not stated in the notice. *Id.*

170. Insurance was effected 21st December, 1807, on the *Hazard*, to Havana. She cleared on the 21st of December, and sailed on the same day, but was detained by head winds, and was afterwards arrested in the bay of Delaware, and prevented from proceeding, under the embargo law, passed 22d December, 1807, and promulgated at Philadelphia on the 24th December, 1807; in consequence of which she returned to port, and was abandoned by the plaintiff to the underwriters. The insured was held to be entitled to recover for a total loss. *Odlin v. Ins. Co. of Pennsylvania*, 2 Wash. C. C. R. 312.

171. A capture as prize will authorize an abandonment, as soon as notice is received, provided the loss continue to the time when the abandonment is made. *Queen et al. v. Union Ins. Co.* 2 Wash. C. C. R. 331.

172. If a re-capture is made with a view to salvage, and this does not exceed, with the expenses, one half of the value of the property, and the re-capture produces only a temporary interruption of the voyage, the insured cannot abandon. *Id.*

173. If the re-capture be as prize, or the voyage be lost, or not worth pursuing; if the salvage be very high, or if further expenses be necessary, and the underwriters will not agree to pay them, the assured may abandon. *Id.*

174. Insurance on the freight of the *Hannah*, at and from New-York to Wilmington in North Carolina, and thence to Barbadoes, and back to Philadelphia.

At Wilmington, a cargo was prepared to be shipped in the *Hannah*, had she arrived there. The vessel was forced, by stress of weather, to put into Norfolk, and arrived there in a state of wreck. The agent of the plaintiffs gave notice to the defendants' agent at Norfolk, and requested him to have all the repairs made that were necessary, which he declined. The repairs would have cost upwards of 3000 dollars, at which sum the vessel was insured. The plaintiffs offered to abandon, and the vessel was sold for 325 dollars.

If the injury which the vessel sustained exceeded one half of her value, the insured had a right to abandon, unless the underwriters would agree, *at all events*, to pay for the repairs, though they should exceed what they were liable for, if only a partial loss had taken place. *Hart et al. v. Delaware Ins. Co.* 2 Wash. C. C. R. 346.

175. The refusal of the agent of the defendants to pay for such repairs only as the defendants were liable for, and not for all the necessary repairs, authorized the abandonment. *Id.*

(C) Effect of an abandonment.

176. The law gives to the act of abandonment, to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be recovered from destruction. *Comegys et al. v. Vasse*, 1 Peters, 213.

177. After an abandonment of a vessel is accepted by the underwriters, they become owners for the voyage, and are liable for seamen's wages from the time they become owners. They are entitled to the freight earned from that period. *Hammond v. The Essex Fire and Marine Ins. Co.* 4 Mason, 196.

178. Where the vessel and freight are separately insured, after an abandonment made to each set of underwriters, the underwriters on the freight are entitled to the freight earned before that time, and the underwriters on the vessel to that earned after. *Id.*

179. If after an abandonment the voyage is continued by the underwriters without objections, it is presumed to be continued on the original terms as to compensation of the master and seamen. *Id.*

180. If the master make a special contract to receive a moiety of the freight in lieu of wages, and procures insurance on his part of the freight, and abandons as for a total loss, and freight is subsequently earned, his abandonment does not operate as an assignment of the freight so subsequently earned, and he is entitled to recover his moiety of the same freight against the owners, or abandonees, who have received it. *Id.*

181. Where the supra-cargo of a vessel which had been captured, the voyage broken up, and the cargo abandoned to the underwriters, has invested the proceeds of the outward shipment in another cargo, upon the sales of which a freight has been made; the underwriters are entitled to the profit. *Simmas v. Union Ins. Co.* 1 Wash. C. C. R. 443.

182. When the outward voyage of a vessel is broken up, and the vessel insured earns freight on her return voyage; the underwriters upon her, on her outward voyage, have no claim to the freight earned after the voyage insured has been broken up. *Id.*

JURISDICTION.

1. The decisions of the Board of Commissioners under the acts of Congress providing for the indemnification of claimants to public lands in the Mississippi territory, (commonly called the Yazoo lands,) are conclusive between the parties in all

cases within the jurisdiction of the Commissioners. *Brown v. Jackson*, 7 *Wheat*. 218. 237.

2. This determination reconciled with that of the Court in *Brown v. Gilman*, ante, vol. IV. p. 255. *Id.* 240.

3. A State Court cannot issue a mandamus to an officer of the United States. *M^cClung v. Silliman*, 6 *Wheat*. 598.

4. In summary proceedings, where a Court exercises an extraordinary power under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction, ought to appear on the face of the record; otherwise, the proceedings are not merely voidable, but absolutely void, as being *coram non judice*. *Thatcher v. Powell*, 6 *Wheat*. 119.

5. If the Court of a State had jurisdiction of a matter, its decision would be conclusive; but this Court cannot yield assent to the proposition that the jurisdiction of a State Court cannot be questioned, where its proceedings are brought, collaterally, before the Circuit Court of the United States. *Elliot et al. v. Peirsol et al.* 1 *Peters*, 340. *Thompson v. Tolmie*, 2 *Peters*, 157.

6. Where a Court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered in law, as trespassers. *Id.* 340.

7. The jurisdiction of any Court exercising authority over a subject, may be inquired into in every Court, where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings. *Id.* 340.

8. Every nation has exclusive jurisdiction over the waters adjacent to its shores, to the distance of a cannon shot, or marine league. *Brig Ann*, 1 *Gallis*, 62.

9. A Court of Common Law cannot, even incidentally, decide a question of prize. *Maisonnaire v. Keating*, 1 *Gallis*. 325.

10. Courts of Common Law have a jurisdiction concurrent with the Admiralty over maritime contracts. *De Lovio v. Boit et al.* 2 *Gallis*. 398.

11. A Court of Law has concurrent jurisdiction with a Court of Equity, to sustain a suit to enforce a bond cancelled by the obligee in consequence of fraud practised by the obligor. *U. States v. Spalding*, 2 *Mason*, 478.

12. The purchase of lands by the *United States*, for public purposes, within the territorial limits of a *State*, does not of itself oust the jurisdiction or sovereignty of such *State* over such lands, so purchased. *United States v. Cornell*, 2 *Mason*, 60.

13. The constitution of the *United States* declares that Congress shall have power to exercise "exclusive legislation" in all "cases whatsoever" over all places purchased by the consent of the *Legislature* of the *State* in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. When, therefore, a purchase of land for any of these purposes is made by the National Government, and the *State Legislature* has given its consent to the purchase, the land so purchased, by the very terms of the constitution, *ipso facto*, falls within the exclusive legislation of Congress, and the *State jurisdiction* is completely ousted. *Id.*

14. The will of a feme covert, under a power reserved in a settlement, must be proved in our Courts of Probate before it can be acted upon elsewhere, exactly as the wills of persons *sui juris*. The Courts of Probate have exclusive jurisdiction of such questions. *Picquet v. Swan*, 4 *Mason*, 443.

15. Courts of limited jurisdiction must act within the scope of their authority, or it must appear on the face of their proceedings that they did so exercise their authority, or all they do will be *coram non judice*. *Lessee of Kemp v. Kennedy*, 1 *Peters* C. C. R. 30.

16. The jurisdiction of State Courts as to treason, is not limited. *Kemp v. Kennedy*, 1 *Peters'* C. C. R. 30.

17. If a Court authorized to try and decide on such offences, declares an act to be treason, which by the laws constituting the Court is not such, it is error and its judgment may be reversed by a superior tribunal; but this is not a usurpation of power. *Id.*

18. A deed executed for the purpose of giving jurisdiction to the Federal Court, will not be countenanced so as to sustain the jurisdiction. *Hurst v. McNeil*, 1 *Wash. C. C. R.* 70.

LEGACY.

1. To make a pecuniary legacy a charge upon lands devised, there must be express words, or a plain implication from the words of the will. *Wright v. Denn*, 10 *Wheat.* 229.

2. Where a legacy for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, and the numbers in neither family are ascertained by the will, all the claimants ought to be brought before the Court. *Pray et al. v. Bell et al.*, 1 *Peters*, 681.

3. The will of the testator says, "whereas my will is lengthy, and it is possible I may have committed some error or errors, I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention; whatever they determine is my intention shall be final and conclusive without any resort to a Court of Justice." Clauses of this description have always received such judicial construction, as would comport with the reasonable intention of the testator. *Id.* 679.

4. Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, Courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of the power, one not foreseen, and which could not be intended by the testator, it has been considered as a case in which the general power of Courts of Justice to decide on the rights of parties ought to be exercised. *Id.* 680.

5. A legacy bequeathed to a grand-daughter by the codicil, "in lieu" of a devise in the will to her mother, who had since deceased, is a revocation of the original devise to the mother. *Brownell v. De Wolf*, 3 *Mason*, 486.

6. A, by his will, left B, a minor, \$20,000, to be invested by his executors in an institution for savings, to be paid on her marriage, or arrival at age, and in the meantime the interest thereon to be paid to his wife for the maintenance of B; and he ordered all the public stock to remain in his name in the loan office at P., to be bound to pay the \$20,000, adding, that his reason for so doing was to make good any deficiency or depreciation that might take place in the Savings Bank. *Held*, that the whole public stock was pledged as security for the principal legacy, but not for the accruing interest. *Vernon v. De Wolf*, 3 *Mason*, 123.

LEX LOCI.

- I. *Lex loci contractus.*
- II. *Lex loci rei sitæ.*
- III. *Lex fori.*

LEX LOCI I.

Lex loci contractus.

1. Five years *bona fide* possession of a slave constituting a title by the laws of Virginia, under which a plaintiff may recover in detinue, such a possession is a legal defence to a purchaser under such possessor, in the Courts of Tennessee. Although the rule of limitation applicable to this species of property is, strictly speaking, a part of the *lex fori* of Virginia, yet as it constitutes the title of the vendor to the property, it is a bar to an action against the vendee in the Courts of another State. *Shelly v. Guy*, 11 *Wheat.* 361.

2. In a contract for the loan of money, the law of the place where the contract is made is to govern; and it is immaterial that the loan was to be secured by a mortgage on lands in another State. *De Wolf v. Johnson*, 10 *Wheat.* 367.

3. In such a case, the statutes of usury of the State where the contract was made, and not those of the State where it is secured by mortgage, are to govern it, unless there be some other circumstances to show that the parties had in view the laws of the latter State. *Id.*

4. The discharge of a citizen from his debts, under the insolvent act of Rhode Island, is no discharge of a contract which was made and to be executed in a foreign country. *Van Reimsdyk v. Kane*, 1 *Gallis.* 371. *Et vide Green v. Sarmiento*, 1 *Peters'* C. C. R. 74, and 3 *Wash. C. C. R.* 17.

5. Independent of the constitution of the United States, a discharge under the laws of a State, may, perhaps, be held a good bar even as to foreign contracts, of an action brought in the Courts of that State: because the Courts are bound by such laws, and the party seeking remedy in such Courts must do it according to the laws of such State. *Babcock v. Weston*, 1 *Gallis.* 168.

6. So also in case of a contract made in a State between citizens of that State, a discharge, good by its laws, may be good every where. The general rule is, that a contract is governed as to its construction and efficacy, by the laws of the place where it is made, and a discharge good there, would be sufficient in every jurisdiction. *Id.*

7. But this rule does not extend to support a bar to the contract, where such bar happens to be good merely by the law of the place where the action is brought, and the party is found; unless the Courts within that State where the remedy is sought, are exclusively bound by its regulations. *Id.*

8. Every State has authority to bind its citizens every where, so long as they continue their allegiance. Unless therefore it be restrained by constitutional provisions, it may act upon the contracts made between its own citizens, in every country, and consequently may discharge them by general laws. *Van Reimsdyk v. Kane*, 1 *Gallis.* 371.

9. But such is not the operation of jurisdiction on contracts made by a citizen with a foreigner in a foreign country. *Id.*

10. If in such case, the legislature by positive laws annul such contracts, it is certain they cannot be enforced within its own tribunals, but elsewhere they remain with the original validity which they had by the *lex loci contractus.* *Id.* ¶

11. If a statute be general, without a direct application to foreign contracts, the rule approved by *Casaregis*, seems proper to be adopted, that its construction shall not be extended to such contracts. *Id.*

12. The rate of damages to be recovered for a breach of contract, is a part of the right to which the injured party is entitled, and is distinct from the remedy for enforcing this claim. In the former case, the *lex loci* of the place where the contract is made or broken prevails; in the latter, the *lex loci* of the forum where the remedy is provided, operates. *Conseque v. Willings*, 1 *Peters' C. C. R.* 225.

13. A law of a foreign country, which protects the party to a contract from execution, will, in the Courts of the United States, protect the same individual from arrest upon the same contract. *Cane franque v. Burnell*, 1 *Wash. C. C. R.* 340.

14. The laws of the country where the contract is made must govern it; but, as according to our forms of proceeding, (and, as to them, the laws of our country must govern,) a judgment can only be rendered for money, no other recovery can be had on a note for a sum of money to be paid in sugar, than for the sum of money mentioned in the note. *Courtois v. Carpentier*, 1 *Wash. C. C. R.* 376.

LEX LOCI II.

Lex loci rei sitæ.

15. A title to lands can only be acquired and lost according to the laws of the State in which they are situate. *Clark v. Graham*, 6 *Wheat.* 577. *Et vide McCormick v. Sullivant*, 10 *Wheat.* 192.

16. In construing local statutes respecting real property, this Court is governed by the decisions of the State tribunals. *Thatcher v. Powell*, 6 *Wheat.* 119. *Et vide Jackson v. Chew*, 12 *Wheat.* 153.

17. The disposition of real property, by deed or will, is subject to the laws of the country where it is situated. *Kerr v. Moon*, 9 *Wheat.* 565. *Darby v. Mayer*, 10 *Wheat.* 469.

18. Where the deviser was entitled to warrants of land in the Virginia Military District in the State of Ohio, under the laws and ordinances of Virginia, on account of his military services, and made a will in Kentucky, devising the lands which was duly proved and registered, according to the laws of the State: *Held*, that although the title to the land was merely equitable, and that not to any specific tract of land, it could not pass, unless by a will proved and registered according to the laws of Ohio. 9 *Wheat.* 565.

19. Even admitting it to have been personal property, a person claiming under a will proved in one State, cannot intermeddle with, or sue for, the effects of a testator in another State, unless the will be proved in the latter State, or it is permitted by some law of that State. *Id.*

20. Letters testamentary give to an executor no authority to sue for the personal estate of his testator, out of the jurisdiction of the State by which they were granted. *Id.*

21. Under the statute of Ohio, which permits wills made in other States, to be proved and recorded in the Court of the county where the property lies, it must appear that the requisitions of the statute have been pursued, in order to give the will the same validity and effect as if made within the State. *Id.*

22. The probate in one State, or country, is of no validity as affecting the title to lands in another. *Darby v. Mayer*, 10 *Wheat.* 469.

23. *Quære*, How far this general principle is modified by the provisions of the constitution, and laws of the United States, in respect to the faith and credit, &c. to be given to the public acts, records, and judicial proceedings of each State in every other State? *Id.*

24. A duly certified copy of a will of lands, and the probate thereof, in the Orphans' Court of Maryland, is not evidence, in an action of ejectment, of a devise of lands in Tennessee. *Id.*

LEX LOCI III.

Lex fori.

25. The Courts of every Government or State, have the exclusive authority of construing its local statutes, and their construction will be respected in other countries or States. *Elmendorf v. Taylor* 10 *Wheat.* 153.

26. A testamentary paper executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy in the Courts of this country, until it has received *probate* here, in the Court having the peculiar jurisdiction of the probate of wills and other testamentary matters. *Armstrong v. Lear*, 12 *Wheat.* 169.

27. The law of the place where a contract is made, is to govern as to the nature, validity, and construction of the contract; but the remedy on such contract is to be pursued according to the law of the place where the suit is brought. *Van Reimsdyk v. Kane*, 1 *Gallis.* 371.

28. When the contract is to be executed in a place different from that where it is made, the law of the place of execution will apply. *Id.*

29. What is of the *substance*, and what belongs to the *remedy* of the contract. *Id.* 376.

30. The subjects of the Ottoman empire are not entitled, in matters of contract, to have a different rule applied to them, from that which is applied to subjects of other nations, especially when both the litigating parties are subjects of that power. *The Jerusalem*, 2 *Gallis.* 201.

31. A plea of the statute of limitations of the State where a contract is made, is no bar to a suit brought in a foreign tribunal to enforce that contract. But a plea of the statute of limitations of the State, where the suit is brought, is a good bar. Principles of the *lex fori* discussed and examined. *Le Roy v. Crowninshield*, 2 *Mason*, 151. *Hinkley v. Marean*, 3 *Mason*, 88.

32. A discharge of the person only, under a foreign insolvent law, leaves the contract still in force; and whether bail should in such cases be demanded or not, must depend upon the laws of the country where the suit is brought. *Webster v. Massey*, 2 *Wash. C. C. R.* 157.

LIMITATION OF ACTIONS.

I. *Limitation of personal actions.*II. *Limitation of real and possessory actions.*

LIMITATION OF ACTIONS I.

Limitation of personal actions.

1. An acknowledgment of a debt which will take a case out of the statute of limitations, must be unqualified and unconditional. *Wetzel v. Buzzard*, 11 *Wheat.* 909.

2. If it be connected with circumstances which, in any manner, affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or, if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown. *Id. Et vide Bell vs. Morrison*, 1 *Peters'* 368.

3. Thus, where an action was brought, on a promise in writing to deliver a quantity of powder, and the original assumpsit being satisfactorily proved, the defendant relied upon the statute of limitations; and one witness deposed, that the defendant told him that *the plaintiff need not have sued him; for if he had come forward and settled certain claims which defendant had against him, the defendant would have given him his powder.* To another witness defendant said, that *he should be ready to deliver the powder whenever the plaintiff settled a suit, which Dr. E. had brought against him, &c.* Held, that those declarations did not amount to an unqualified and unconditional acknowledgment of the debt, but that the plaintiff ought to have proved a performance, or a readiness to perform the condition on the new promise made. *Wetzell v. Buzzard*, 11 *Wheat.* 309.

4. The terms "*beyond seas*," in the saving clause of a statute of limitations, are to be construed as equivalent to "*without the limits of the State*," where the statute is enacted. *Shelby v. Guy*, 11 *Wheat.* 361.

5. The former decision of this Court, upon the saving clause of the statute of limitation relating to persons *without the limits of the State*, in *Murray v. Baker*, (8 *Wheat.* 541.) revised and confirmed, S. C. *Id.*

6. Under the fourth section of the act of April 10th 1806, ch. 21, although the condition of the marshal's bond is broken by his neglecting to bring the money into Court, directed to be so brought in, or to pay it over to the party, yet, if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued, so as to bar it, if not commenced within six years. *Montgomery v. Hernandez*, 12 *Wheat.* 129.

7. An acknowledgment of the debt by the personal representatives of the original debtor, deceased, will not take the case out of the statute of limitations. *Thompson v. Peter*, 12 *Wheat.* 565.

8. After a dissolution of partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial, what is the consideration which is to raise such cause of action; whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration, which might prove beneficial to them. Unless adopted by them, they are not bound by it. *Bell v. Morrison*, 1 *Peters*, 373.

9. The statute of limitations of Kentucky, is substantially the same with the statute of 21 James 2, ch. 16, with the exception that it substitutes the term of five years instead of six. The English decisions are not, however, conclusive authority, upon the construction of the statute passed by a State, upon the like subject; for this justly belongs to the local state tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence than those of any foreign tribunal, however respectable. *Id.* 359.

10. It is a good replication to a plea of the statute of limitations, that the plaintiff is a foreigner, and has never been within the limits of the State, where the suit is brought. *Chomqua v. Mason*, 1 *Gallis.* 342.

11. The statute of limitations of Massachusetts, (which as to this point is a transcript of the stat. 21 Jac. ch. 16,) applies only to suits at Common Law for mariners' wages, and not to suits in the Admiralty. *Brown v. Jones*, 2 *Gallis.* 477.

12. The respondent in the Admiralty cannot avail himself of the statute of limitations unless he plead it. *Id.*

13. A plea of the statute of limitations of the State, where a contract is made, is no bar to a suit brought in a foreign tribunal to enforce that contract. But a plea of the statute of limitations of the State, where the suit is brought, is a good bar. *Le Roy v. Crowninshield*, 2 *Mason*, 151.

14. Neither the general statute of limitations, nor the statute of limitations of Massachusetts, as to executors and administrators, binds the United States in a suit in the Circuit Court; and, of course, neither can be pleaded in bar of such suit. *U. States v. Hoar*, 2 *Mason*, 311.

15. A owns an upper mill and B a lower mill on the same stream, with a dam of a height which obstructs the free use of the upper mill. B lowers his dam two feet, and allows it to remain in that state thirty eight years, and during that period the upper mill is free of obstruction. B then sells the lower mill to A, who afterwards sells the lower mill to C. Held, that by the lapse of time and unity of possession the right of raising the dam of the lower mill two feet was gone, and that the upper mill had acquired a right to use the water without back-flowing. *Hazard v. Robinson*, 3 *Mason*, 272.

16. Unity of possession does not extinguish the right to use a water course appurtenant to a mill. *Id.*

17. Twenty years' possession of an easement or use of a water-course is a conclusive presumption of right if unexplained. *Id.* *Tyler v. Wilkinson*, 4 *Mason*, 397.

18. The commencement of a suit, to defeat the statute of limitations, must be the same suit to which the plea is pleaded. *Delaplaine v. Crowninshield*, 3 *Mason*, 329.

19. To a plea of the statute of limitations, it is not a good replication, that a suit for the same demand was commenced in a Court in another State, and discontinued within six years. *Id.*

20. The statute of limitations of a State is no bar to a suit on the Admiralty side of the Courts of the United States. *Willard v. Dorr*, 3 *Mason*, 91.

21. If a party says, on his promissory note's being produced to him, that it is as good as money, this is sufficient evidence to take the same out of the statute of limitations. *Arnold v. Dexter*, 4 *Mason*, 122.

22. Any offer on the part of the debtor, operates to remove the bar of the statute of limitations, which fairly interpreted amounts to a promise to pay, or to an acknowledgment of the debt, or of some debt; as if the debtor says "he will pay, if the demand is proved;" or a promise to account, though he adds, "that he owes nothing." *Read v. Wilkinson*, 2 *Wash. C. C. R.* 514.

23. If any thing is added which negatives a promise of payment, or an acknowledgment of a debt, it must be considered as qualifying every expression; as if A says he owes the debt, "but will not pay it, and will avail himself of the statute of limitations." *Id.*

24. If a promise to pay a debt, barred by the statute of limitations, is conditional, the remedy for the recovery of the debt is not revived, unless the condition is performed. *Id.*

25. When a subsequent promise, or acknowledgment of a debt is made, it may be given in evidence, to remove the bar of the statute of limitations; although the action be brought upon the original cause of action. But if the new promise, vary the terms of the original contract, on which the action is brought; as if the former be conditional, and the latter absolute; the former cannot be given in evidence. *Lonsdale v. Brown*, 3 *Wash. C. C. R.* 404.

LIMITATION OF ACTIONS II.

Limitation of real and possessory actions.

26. Presumptions of a grant, arising from the lapse of time, are applied to corporeal, as well as incorporeal hereditaments. They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are perfectly consistent with the non-existence of a grant. *A fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant. *Ricard v. Williams*, 7 *Wheat.* 59. 109.

27. In general, it is the policy of Courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the sta-

tute does not apply. Where the statute applies, the presumption is not generally resorted to; but if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute. *Id.* 110.

28. One heir, notwithstanding his entry as heir, may afterwards, by disseisin of his co-heirs, acquire an exclusive possession, upon which the statute will run both against his co-heirs and against creditors. *Id.* 120.

29. An heir may claim an estate by title distinct or paramount to that of his ancestor; and if his possession is exclusive under such claim, against all other persons, until the statute period has run, he is entitled to the protection of the bar. *Id.* 121.

30. Although the statutes of limitation do not apply, in terms, to Courts of Equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held by analogy to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired. *Elmendorf v. Taylor*, 10 *Wheat.* 152. 168.

31. Where an adverse possession has continued for twenty years, it constitutes a complete bar in equity, wherever an ejectment would be barred if the plaintiff possessed a legal title. *Id.*

32. If the statute of limitations has once run against a tenant in tail, it is a complete bar to a subsequent tenant in tail upon a descent cast. *Inman v. Barnes*, 2 *Gallia.* 315.

33. Where a party has been absent from the country during a war, the period of the war should not be construed against him, in computing the length of time in which an ejectment can be brought. *Delancey v. M'Keen*, 1 *Wash. C. C. R.* 354.

34. The statute of limitations of Pennsylvania, is substantially the same as that of 21 Jac. I. ch. 16. The limitation begins to run from the time of an actual adverse possession, and not before. *Potts v. Gilbert*, 3 *Wash. C. C. R.* 475.

35. Adverse possession must continue, in point of locality, during the twenty-one years. A possession of part of a tract of land, short of twenty-one years, cannot be joined to a possession of another part, so as to make up the period. The possession of different intruders, in succession, upon the same part of the tract, cannot be added together by the last intruder, so as to make up twenty-one years of adverse possession, against the real owner. *Id.*

36. The possession of the disseisor, to bar the plaintiff, can never extend beyond the limits of the particular spot upon which he is seated; and the legal possession of the owner continues unaffected as to the residue of the tract, by such tortious possession; and his legal possession revives the moment the intruder quits the part of the tract he may have occupied. *Id.*

37. A sale, by one intruder to another, without an exact definition of the property conveyed, will not aid the purchaser in establishing a continued adverse possession. *Semble*, That an intruder, who has not had twenty-one years' possession, has no title to convey. *Id.*

LOCAL LAW.

- I. *Alabama.*
- II. *District of Columbia.*
- III. *Georgia.*
- IV. *Louisiana.*
- V. *Maine.*
- VI. *Maryland.*
- VII. *Massachusetts and Connecticut.*
- VIII. *Mississippi.*
- IX. *Missouri.*
- X. *New-Hampshire.*
- XI. *New-Jersey.*
- XII. *New-York.*
- XIII. *Ohio.*
- XIV. *Pennsylvania.*
- XV. *Rhode Island.*
- XVI. *Tennessee and North Carolina.*
- XVII. *Virginia and Kentucky.*

LOCAL LAW I.

Alabama.

1. The act of May 8th, 1820, ch. 595, "for the relief of the legal representatives of Henry Willis," did not authorise them to enter lands within the tract surveyed and laid off for the town of Claiborne, in the State of Alabama. *Chotard v. Pope*, 12 *Wheat.* 587.

2. A concession of lands made by the Spanish authorities at Mobile, in the year 1806, cannot be given in evidence to support an ejectment in the Courts of the United States, the same not having been recorded, or passed upon by the board of commissioners, or register of the land office, established by the acts of Congress, relating to land titles in that country. *De La Croix v. Chamberlain*, 12 *Wheat.* 599.

LOCAL LAW II.

District of Columbia.

3. The Circuit Court for the District of Columbia has authority to adjourn to a distant day, and the adjourned session is considered as the same term. *Mechanics' Bank of Alexandria v. Withers*, 6 *Wheat.* 106.

4. The third section of the act of Congress, of March 3d, 1803, for the relief of insolvent debtors in the District of Columbia, does not create any express or implied exception to the operation of the statute of limitations, by making the insolvent a trustee for his creditors, in respect to his future property, or by making any demand, included in the schedule of his debts, a debt of record. *Bowie v. Henderson*, 6 *Wheat.* 514.

5. The including of a demand in the schedule of the insolvent's debts, is sufficient evidence to sustain an issue on a replication of a new promise to the plea of the statute of limitations, if the period of limitation has not elapsed after the date of the schedule. *Id.*

6. The power given to the corporation of Georgetown, by the act of Maryland, of November, 1797, c. 56, to graduate the streets of that city, is a continuing

power, and the corporation may from time to time alter the graduations so made. *Goszler v. The Corporation of Georgetown*, 6 *Wheat.* 593.

7. The ordinance of May, 1799, by which the corporation of Georgetown first exercised the power of graduating the streets, is not in the nature of a compact, and may be altered by the corporation. *Id.*

8. The turnpike road stock, paid in as a part of the capital of the Union Bank of Alexandria, before its incorporation, became the common property of the association, so as to be subject to be sold and distributed among the members, after the charter, which directed that the capital stock should consist of money only, was accepted; and those who subscribed the road stock, or their assignees, are not entitled to have the same returned specifically to them. *Holbrook v. Union Bank of Alex.* 7 *Wheat.* 553.

9. The vestry of the Episcopal church of Alexandria, now known by the name of *Christ's Church*, is the regular vestry, in succession, of the parish of Fairfax, and, in connexion with the minister, has the care and management of all the temporalities of the parish within the scope of their authority. A sale by them of the church lands, with the assent of the minister, under the former decree of this Court, conveys good title to the purchaser. *Mason v. Muncaster*, 9 *Wheat.* 445. 454.

10. The parishioners have, individually, no right or title to the glebe lands; they are the property of the parish, in its aggregate or corporate capacity, to be disposed of, for parochial purposes, by the vestry, who are the legal agents and representatives of the parish. *Id.* 468.

11. Under the 8th section of the act of 1812, to amend the act for the incorporation of the city of Washington, a sale of unimproved squares or lots in the city, for the payment of taxes, is illegal, unless such squares and lots have been assessed to the true and lawful proprietors thereof. *Corporation of Washington v. Pratt*, 8 *Wheat.* 681.

12. The lien upon each lot, for the taxes, is several and distinct, and the purchaser of each holds his lot unencumbered with the taxes due on the other lots held by his vendor. *Id.*

13. The advertisement must contain a particular statement of the amount of taxes due on each lot separately. *Id.*

14. If the sale of one or more lots produce the amount of taxes actually due on the whole by the same proprietor, the corporation cannot proceed to sell further. *Id.*

LOCAL LAW III.

Georgia.

15. In general, the validity of a patent for lands can only be impeached for causes anterior to its being issued, in a Court of Equity. But where the grant is absolutely void, as where the State has no title, or the officer has no authority to issue the grant, the validity of the grant may be contested at law. *Paterson v. Winn*, 11 *Wheat.* 380.

16. The laws of Georgia, in the year 1787, did not prohibit the issuing of a patent to any one person for more than 1000 acres of land. The proviso in the Act of Assembly of the 17th of February, 1783, limiting the quantity to that number, is exclusively confined to *head rights*. *Id.*

LOCAL LAW IV.

Louisiana.

17. As by the laws of Louisiana, questions of fact in civil cases are tried by the Court, unless either of the parties demand a jury; in an action of debt on a judgment, the interest on the original judgment may be computed, and make part of the

judgment in Louisiana, without a writ of inquiry and the intervention of a jury. *Mayhew v. Thatcher*, 6 *Wheat.* 129.

18. The negotiability of a promissory note, payable to order, is not restrained by the circumstance of its being given for the purchase of real property in Louisiana, and the notary, before whom the contract of sale is executed, writing upon it the words "*ne varietur*," according to the laws and usages of that State, and other countries governed by the civil law. *Fleckner v. United States Bank*, 8 *Wheat.* 338.

LOCAL LAW V.

Maine.

19. A mortgagee of a satisfied mortgage cannot maintain an action at law to recover possession against the mortgagor, or persons claiming under him, by the law of the State of Maine. *Gray v. Jenks*, 3 *Mason*, 520.

LOCAL LAW VI.

Maryland.

20. Under the act of assembly of Maryland of 1795, (c. 56,) if the defendant appears, and dissolves the attachment, a declaration and subsequent pleadings are not necessary, as in other actions, but the cause may be tried upon a *short note*. *Goldsborough v. Orr*, 8 *Wheat.* 217.

21. *It seems*, under the same act, that an attachment will not lie in a case *ex contractu* for unliquidated damages for the non-delivery of goods. But where the plaintiff is entitled to a stipulated sum of money, in lieu of a specific article to be delivered, an attachment will lie. *Id.* 226.

22. The local law of Maryland, as to the effect of evidence of the probate of a will of lands, in an action of ejectment, is the same with the common law. *Darby's Lessee v. Mayer*, 10 *Wheat.* 470.

23. The act of assembly of Maryland of 1798, s. 4, ch. 2, art. 3, does not extend to a will of lands, so as to make the probate conclusive evidence in an action of ejectment. *Id.* 471.

24. *Quære*, Under the act of the assembly of Maryland, of 1729, c. 8, how far the fact of possession not having accompanied a deed of assignment for the benefit of creditors would invalidate it? *Brooks v. Marbury*, 11 *Wheat.* 78.

25. Under the same act of assembly, a copy of the deed is inadmissible in evidence, where the original is in the power of the party offering the copy. *Id.* 82.

26. The title and claim of Charles Lord Baltimore, his heirs and representatives, to the quit rents reserved by the proprietary of the late Province (now State) of Maryland, was extinguished by the agreement between the heirs, devisees, and personal representatives of the said Lord Baltimore, and of his son and heir, Frederick Lord Baltimore, made in 1780, and confirmed by an act of the British Parliament in 1781. *Cassell v. Carroll*, 11 *Wheat.* 134.

27. *It seems* that a *bona fide* assignment, for a valuable consideration, made by a husband, of a debt actually and presently due to his wife, devests, in equity, the title of his wife. *Id.*

28. But, however this may be in general, the agreement made in 1780, including the quit rents then actually due (if at all) to Louisa Browning, the daughter of Charles Lord Baltimore, and assigning them to Henry Harford, the devisee of Frederick Lord Baltimore, having been entered into in England, by the husband of Louisa Browning and her committee, (she being a lunatic,) and the consideration having actually gone beneficially for her use; and the whole transaction having been between British subjects, under the direction of the High Court of Chancery, and confirmed by an act of Parliament, transferred a complete legal and equitable title to the assignee. *Id.*

29. The statute of 11 and 12 Wm. III., c. 6, which is in force in Maryland, removes the common law disability of claiming title through an *alien ancestor*, but does not apply to a *living alien ancestor*, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural born subject or citizen. *McCreery v. Somerville*, 9 *Wheat*. 354.

30. Thus, where A died seized of lands in Maryland, leaving no heirs, except B, a brother, who was an alien, and had never been naturalized as a citizen of the United States, and three nieces, the daughters of the said B, who were native citizens of the United States; it was *held*, that they could not claim title by inheritance, through B, their father, he being an alien, and still living. *Id.*

31. By the laws of Maryland, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join her in the deed. The separate examination, and other solemnities, required by law, are indispensable, and must not be omitted. *Rhea v. Renner*, 1 *Peters*, 199.

32. By the laws of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years; and shall not have been heard of during that time. *Id.*

33. The act of Maryland against usury is in the words of the statute of Anne. It declares, "all bonds, contracts, and assurances whatever, taken on an usurious contract," to be utterly void. The endorsement of a negotiable note, for a usurious consideration, is within the statute, and therefore void. *Gaither v. Farmers' and Mechanics' Bank of Georgetown*, 1 *Peters*, 43.

34. The Orphans' Court by the testamentary laws of Maryland has a general power to administer justice, in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to the executor or administrator, is submitted to the discretion of the Court, "not under five per cent. nor exceeding ten per cent. on the amount of the inventory." *Nicholls v. Hodge's Ex.* 2 *Peters*, 565.

35. If the executor has a claim against the deceased, it shall stand on an equal footing with other claims of the same nature. *Id.* 565.

36. On a plenary proceeding, if either party shall require, the Court will direct an issue or issues to be made up and sent to a Court of Law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the Court of Chancery or to a Court of Law. And in Maryland, the decision of the Court to which the appeal is made is final and conclusive. *Id.*

37. The act of Maryland of 19th December 1791, entitled "An act concerning the territory of Columbia, and the city of Washington," which by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen. *Spratt v. Spratt*, 1 *Peters*, 349.

38. A foreigner who becomes a citizen, is no longer a foreigner, within the view of the act. His *after purchased lands* vest in him as a citizen, not by virtue of the act of Maryland. *Id.* 349.

39. Lands in the county of Washington, and District of Columbia, purchased by a foreigner, before naturalization, were held by him under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit them, is given absolutely by this act, and is not affected by his becoming a citizen. *Id.*

40. The act of Maryland, relative to a devise of the real estate of intestates in certain cases, in directing the commissioners when to give deeds to purchasers, has this general provision; that the commission and proceedings thereon shall be recited in the preamble of the deed. It certainly could not have been intended that the commission and all the proceedings should be set out in *hæc verba*. If the substance of the proceedings is recited, it is sufficient. *Thompson v. Tolmie*, 2 *Peters*, 157.

41. The law appears to be settled in the States, that Courts will go far to sustain *bona fide* titles acquired under sales made by statutes regulating sales made by order of Orphans' Courts. Where there has been a fair sale, the purchaser will not be bound to look beyond the decree, if the facts necessary to give the Court jurisdiction appear on the face of the proceedings. *Id.*

42. By the law of descent of Maryland, a person claiming as heir must prove himself heir of the person last seized of the estate; and if an intestate leaves a brother of the whole blood who survived him and died without issue, and without having ever been actually seized of the estate, the estate will descend to the half blood of the person so seized. *Chirac v. Reinicker, 2 Peters, 613.*

43. Under the act of Maryland of 1796, ch. 47, sec. 13, the manumission by will of a slave, whose time of freedom commenced when he was eleven years old, is valid. *Le Grand v. Darnall, 2 Peters, 664.*

44. A devise of property real or personal by a master to a slave, entitles the slave to his freedom by necessary implication. *Id.*

45. A lot of ground had, in the original plan of an addition to Georgetown, been marked "for the Lutheran Church," and by the German Lutherans of the place had been used as a place of burial from the dedication, and they had erected a school house on it, but no church; exercising acts of ownership over it, by committees appointed by the German Lutherans, the original owner acquiescing in the same. This may be considered as a dedication of the lot to public and pious uses; and although the German Lutherans were not incorporated, nor were there any persons who as trustees could hold the property, the appropriation was valid under the bill of rights of Maryland. The bill of rights, to this extent at least, recognizes the doctrines of the statute of Elizabeth for charitable uses; under which it is well known that such uses would be upheld, although there was no specific grantee or trustee. This might at all times have been enforced as a charitable and pious use, through the intervention of the government, as *parens patriæ*, by its attorney general or other law officer. It was originally consecrated for a religious purpose. It has become a depository of the dead; and it cannot now be resumed by the heirs of the donor. *Beatty v. Kurtz, 2 Peters, 568.*

LOCAL LAW VII.

Massachusetts and Connecticut.

46. Under the laws of Massachusetts and Connecticut, the power of the administrator to sell the real estate for the payment of debts must be exercised within a reasonable time, which is to be fixed by analogy to the statute of limitations. *Riscard v. Williams, 7 Wheat. 59. 115.*

47. The case of such a power to sell is not within the purview of the statute of limitations of Connecticut, which limits all rights of entry and action to fifteen years after the title accrues; but the reasonable time within which the power must be exercised, is to be fixed by analogy to that statute. *Id.*

48. Where under a voluntary assignment of an insolvent debtor, the proceeds of all the property received by the assignees under the assignment are insufficient to pay the amount of the just debts and dividends due to the assignees, the established doctrine in Massachusetts is, that the assignees cannot be holden as trustees of the debtor, to the creditor who is plaintiff in an attachment, so as to be chargeable to him in the suit. Even if the assignment were held to be constructively fraudulent in point of law, they would be entitled to retain their own *bona fide* debts; for, as to those, they stand upon equal grounds with any other creditors. This is understood to be the clear result of the cases decided in Massachusetts. *Beach v. Viles, 2 Peters, 675.*

49. The statute of limitations of Massachusetts, (which as to this point is a transcript of 21 Jac. ch. 16,) does not apply to suits in the Admiralty for mariners' wages. *Brown v. Jones, 2 Gallis. 477.*

50. One, who was not a Quaker, refusing to be sworn as a witness, on the ground of conscientious scruples arising from a declaration formerly made, was committed for a contempt, the liberty to affirm being strictly confined to Quakers by the laws and practice of Massachusetts. *United States v. Coolidge*, 2 Gallis. 364.

51. An extent under the statute of Massachusetts of 1784, upon real estate, is not good unless it appear by the return, that all the appraisers are sworn; nor unless all the appraisers concur in the appraisal. *United States v. Slade*, 2 Mason, 71.

52. But it is not necessary to the validity of the levy as between the parties and their privies, that the levy should be recorded within the three months prescribed by the statute; nor, that a certificate of the appraisal should be made and signed by the appraisers. It is sufficient, that the officers' return contains all the facts necessary to make the levy valid. *Id.*

53. Judgment in a trustee process against the defendant as garnishee of the plaintiff, is no defence in a suit for the debt, if the plaintiff in the original trustee process, has by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution can no longer issue upon it, and it cannot be revived by a *scire facias*. *Flower v. Parker*, 3 Mason, 247.

54. Where the estate of a tenant in fee tail male was confiscated to the commonwealth, under the statute of Massachusetts of April, 1779, for confiscating the estates of absentees: *Held*, that the estate of the remainder-man was not thereby divested, but that the commonwealth took only, by virtue of the confiscation, such an estate as the absentee had in the premises. Also *held*, that the tenant in possession of the premises under a defective title from the commonwealth, after the expiration of this estate, was entitled to the value of his improvements. *Borland v. Dean*, 4 Mason, 174.

55. By the Massachusetts statutes of descent, reversions and remainders, after life estates, vested by descent in the intestate, pass to his heirs, without any regard to the ancestor from whom he inherited, in the same manner as estates in possession. *Cook v. Hammond*, 4 Mason, 467.

56. The common law, in such case, is different, and gives the estate in reversion to the heir of the first purchaser or reversioner, who is heir at the time when the life estate expires. *Id.*

57. Under the act of 1783, ch. 36, the eldest son took a double portion in remainders and reversions, as well as in estates in possession. *Id.*

58. Where a deed was executed in Massachusetts, by a husband, of lands owned by him in that State, in March, 1808, and afterwards, in November, 1808, his wife signed and sealed the same deed with the following words written over her signature: "I agree in the above conveyance; in witness whereof," &c. giving the date, &c. it was *held*, that by the local law such a conveyance did not operate as a release of her dower in the estate so conveyed. *Hall v. Savage*, 4 Mason, 273.

59. When the commonwealth is seised under an inquest of office for lands, that seisin must be deemed to continue, until the title is lawfully parted with; for the commonwealth cannot be disseised. *Stokes v. Dawes*, 4 Mason, 268.

60. A resolve of the legislature, releasing such title to another, may be construed as a grant, if necessary to give it effect. *Id.*

61. In Massachusetts, a feme covert may convey her estate by deed joining with her husband, as fully as the same could be conveyed in England by a fine or recovery. *Durant v. Ritchie*, 4 Mason, 45.

62. A, and B his wife, conveyed her estate to C and his heirs to the use of A and B, during their joint lives, and to the use of the survivor in fee simple. *Held*, that this deed operated as a feoffment, and the uses were well raised out of the seisin of C, and were executed by the statute of uses. *Id.*

63. The statute of limitations of actions against executors or administrators in Massachusetts, does not begin to run against persons who have a right to appeal from the decree granting administration, until their right of appeal is lost, or the decree becomes absolute. *Tracothick v. Austin*, 4 Mason, 16.

64. Trusts devolving on an executor, and trust property in the hands of the deceased, kept separate, are not assets in the hands of executors and administrators; and the statute of limitations does not run against them. *Id.*

65. The act of Massachusetts of 15th March, 1821, ch. 35, s. 2, which punishes waste and cutting down trees, &c. by one tenant in common, without notice to others, by treble damages, applies only to cases where the tenancy in common is admitted, and not to cases where the entirety is claimed by title, or disseisin, although it turns out defective as to a moiety. *Prescott v. Nevers*, 4 *Mason*, 326.

66. Of the true nature and extent of the trustee process authorized by the statute of Massachusetts of 1794, ch. 65. It seems that it does not authorize an attachment of any property which is not tangible, and might be levied on execution, if discovered, or of any debts or credits, where the trustee sets up any title or claim adverse to that of the debtor; for example, where the trustee claims under a post-nuptial settlement by the debtor. *Picquet v. Swan*, 4 *Mason*, 443.

67. Where persons, sued as trustees in a foreign attachment, assert an adverse title to the property in a third person, as her separate property, they are not bound to answer how they have disposed of it for her use from time to time. *Id.*

68. A trustee may, in a foreign attachment process, set off against a debt or claim due from him to the debtor, any claim he has against the debtor, which she could set off in an adverse suit at law brought by the debtor himself. *Id.*

69. Where the persons sued as trustees of the husband claim title as appointees and trustees under the will of the wife, and the will has not been admitted to probate, they cannot be adjudged trustees. *Id.*

70. Property pledged, and in which the party has a lien, is not liable to be attached by a trustee process. *Id.*

LOCAL LAW VIII.

Mississippi.

71. Spanish grants, made after the treaty of peace of 1782, between the United States and Great Britain, within the territory east of the river Mississippi, and north of a line drawn from that river at the 31st degree of north latitude, east to the middle of the river Apalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States. *Henderson v. Poindexter's Lessee*, 12 *Wheat.* 530.

72. No Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the compact between the United States and Georgia, of the 24th of April, 1802, or has been laid before the board of commissioners constituted by the act of Congress of the 3d of March, 1803, ch. 340, and of March 27th, 1804, ch. 414. *Id.*

73. The act of cession by Georgia to the United States requires the party to prove that the ancestor or person under whom he claims, was an "actual settler," on the 27th October, 1795. *Hickie v. Starke*, 1 *Peters*, 98.

74. It seems, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient; though the proprietor should not reside in person on the estate, or within the territory.

75. Under the act of Congress of March 3d, 1803, entitled "an act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the State of Tennessee," such lands only were authorized to be offered for sale, as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners, in pursuance thereof; it follows, incontestibly, that the right of the plaintiff in the ejectment, derived from a donation certificate, is superior to that of the defendant, derived from a purchase at the sales, unless there is some fatal infirmity in the certificate, which renders it void. *Ross v. Barland*, 1 *Peters*, 666.

76. The section of the act of Congress of March 3d, 1803, was intended to confer a bounty on a numerous class of individuals; and in construing the ambiguous words of the section, it is the duty of the Court to adopt that construction which will best effect the liberal intentions of the legislature. *Id.* 667.

77. By the law of Mississippi, the assignee of a chose in action may institute a suit in his own name. When therefore an executor, having proved the will of his testator in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi, the suit was well brought by the assignee, without any probate of the will in that State. *Harper v. Butler*, 2 *Peters*, 239.

LOCAL LAW IX.

Missouri.

78. The lien of a judgment on the lands of the debtor, created by the statute of Missouri, and limited to a certain period of time, is unaffected by the circumstance of the plaintiff not proceeding upon it, (during that period,) until a subsequent lien has been obtained and carried into execution. *Rankin v. Scott*, 12 *Wheat.* 177.

79. Universal principle that a prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or in equity. *Id.*

80. Mere delay in proceeding to execution is not such an act. *Id.*

LOCAL LAW X.

New-Hampshire.

81. The act of New-Hampshire of June 19th, 1805, allowing to tenants the value of improvements, &c. on recoveries against them, so far as it applies to past improvements, is contrary to the constitution of that State. *Society, &c. v. Wheeler*, 2 *Gall.* 105.

82. The statute of limitations of *New-Hampshire* (which is in this respect a transcript of 21 Jac. I. ch. 16,) does not apply as a bar to an action of debt upon the provision of the statute making the stockholders liable to the holder of bills; for it is not founded on any contract or lending without speciality. *Bullard v. Bell*, 1 *Mason*, 243.

LOCAL LAW XI.

New-Jersey.

83. The act of New-Jersey of 1778, relative to the sale of the estates of persons attainted of treason, did not authorise a sale of forfeited estates free from incumbrances, and a lien on lands sold under that law continued, notwithstanding a sale. *Beach v. Woodhull*, 1 *Peters' C. C. R.* 2.

84. The law of 1783 is a positive bar to the claims of a mortgagee on an estate sold under its authority. This law is retrospective and unjust, but it is not repugnant to the constitution, and the Court will not declare it a nullity. *Id.*

85. A feme covert, who, in April 1776, joined the enemy in company with her husband, committed no offence under the act of the legislature of New-Jersey, passed 11th December 1778, relating to forfeited estates; and voluntarily remaining with the enemy, after the enacting of that law, without aiding them, by council or otherwise, was not an offence against its provisions. *Kemp v. Kennedy*, 1 *Peters' C. C. R.* 30.

86. The owners of estates, wrongfully forfeited under the act of 11th December, 1778, have no remedy, by ejectment, to recover the property forfeited ; but could only proceed by writ of error according to the statute. *Id.*

LOCAL LAW XII.

New-York,

87. Where a statute of the State of New-York, affecting the title to lands, had been in existence for thirty years, and had been uniformly sanctioned by the decisions of the Courts of the State : Held, that this Court was bound by such decisions, it not being objected to the statute that it was repugnant to the constitution, laws or treaties of the United States, but only to the constitution of the State. *Barker v. Jackson*, 1 *Paine*, 559.

88. The act of the State of New-York of 24th March, 1797, entitled " An act to settle disputes concerning the titles to lands in the county of Onondaga," is in effect only a statute of limitations, and a valid and constitutional law. *Id.*

89. The commissioners appointed under this act were not a Court within the meaning of the 41st section of the constitution of the State. They acted in the character of arbitrators, to hear disputes that should be voluntarily submitted to them ; and if their award was not specially agreed to by the parties, it had no binding effect upon the right. It was not necessary, therefore, that they should proceed according to the course of the Common Law or by jury trial. *Id.*

90. This act is a law of the land within the meaning of the 13th article of the constitution, although it does not extend over the whole State, but is confined to lands in the county of Onondaga. *Id.*

91. The act of New-York, entitled " an act limiting the period of bringing claims and prosecutions against forfeited estates," was not intended to bar those against whom the forfeiture had passed, but to bar the claims of strangers to the forfeiture. The mischief apprehended was the loss of deeds, which was to be feared in the case of strangers only, and not of those who claimed under the forfeited title. *Fisher v. Harnden*, 1 *Paine*, 55.

LOCAL LAW XIII.

Ohio.

92. The laws of Ohio require all deeds of land to be executed in the presence of two witnesses, and a deed executed in the presence of one witness only is void. *Clark v. Graham*, 6 *Wheat*. 577.

93. It is a rule, both at law and in equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title. *Watts v. Lindsey*, 7 *Wheat*. 158. 161.

94. To support an entry, the party claiming under it must show that the objects called for are so described, or are so notorious, that others, by using reasonable diligence, can readily find them. *Id.* 161.

95. The following entry was pronounced under the circumstances, to be void for uncertainty : " 7th of August, 1787. Capt. Ferdinand O'Neal enters 1000 acres, &c. on the waters of the Ohio, *beginning at the northwest corner of Stephen T. Mason's entry*, No. 654, thence with his line east 400 poles, north 400 poles, west 400 poles, south 400 poles." The entry of *Stephen T. Mason* referred to, being as follows : " 7th of August, 1787. Stephen T. Mason, assignee, &c. enters 100 acres of land on part of a military warrant, No. 2012, on the waters of the Ohio, beginning 640 poles north from the mouth of *the third creek* running into the Ohio, above the mouth of the Little Miami River ; thence running west 160 poles ; north 400 poles ; east 400 poles ; thence to the beginning. *Id.* 159.

96. The *Ohio and Little Miami Rivers* are identified and notorious objects. *Id.* 161.

97. But *the third creek* above the mouth of the Little Miami, is to be taken according to the numerical order of the creeks, unless some other stream has by general reputation or notoriety been so considered. *Id.* 162.

98. *Cross Creek*, the stream which the party claiming under O'Neal's entry, assumed for the beginning to run the 640 poles north from the mouth of the *third creek*, as called for in Mason's entry, not being in fact numerically the *third creek above the mouth of the Little Miami*, and there being no satisfactory proof that it had acquired that designation by reputation—the claim was pronounced invalid. *Id.* 162.

99. A statute, for the commencement of which no time is fixed, commences from its date. *Mathews v. Zane*, 7 *Wheat.* 164. 211.

100. The lands included within the Zanesville district, by the act of Congress of the 3d of March, 1803, c. 340, s. 6, could not, after that date, be sold at the Marietta land office. *Id.* 209.

101. The decision of this Court in *Matthews v. Zane*, 5 Cranch, 92, revised and confirmed. *Id.*

102. A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation. *Hoofnagle v. Anderson*, 7 *Wheat.* 212. 214.

103. Courts of Equity consider an entry as the commencement of title, and will sustain a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made. *Id.* 214.

104. But they never sustain an entry made after the date of the patent. *Id.* 215.

105. The above case attempted to be taken out of the general rule upon the ground that the equity of the party claiming under the entry commenced before the legal title of the other party was consummated. *Id.* 215.

106. But the circumstances of the case, and the equity arising out of it, were not deemed by the Court sufficient to take it out of the general rule. *Id.* 215.

107. The owner of a survey made in conformity with his entry, and not interfering with any other person's right, may abandon his survey after it has been recorded. *Taylor v. Myers*, 7 *Wheat.* 23.

108. The proviso in the act of Congress of March 2, 1807, c. 76, s. 1, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed; not to those which have been abandoned, and in which no person has an interest. *Id.* 23

109. Under the reserve contained in the session act of Virginia, and under the acts of Congress of August 10th, 1790, ch. 67, [xl.] and of June 9th, 1794, ch. 238, [lxii.] the whole country lying between the Scioto and Little Miami rivers, was subjected to the military warrants, to satisfy which the reserve was made. *Doddridge v. Thompson*, 9 *Wheat.* 469.

110. The territory lying between two rivers, is the whole country from their sources to their mouths; and if no branch of either of them has acquired the name, exclusive of another, the main branch, to its source, must be considered as the true river. *Id.* 473.

111. The act of June 26th, 1812, ch. 432, [cix.] to ascertain the western boundary of the tract reserved for the military warrants, and which provisionally designate *Ludlow's line* as the western boundary, did not invalidate the title to land between that line and *Robert's line*, acquired under a Virginia military warrant, previous to the passage of that act. *Id.* 478.

112. The land between Ludlow's and Robert's line was not withdrawn from the territory liable to be surveyed for military warrants, by any act of Congress passed before the act of June 26th, 1812, ch. 432. [cix.] *Id.* 480.

113. Question as to the sufficiency of the acknowledgment of a deed of lands in Ohio. *Hinde's Lessee v. Longworth*, 11 *Wheat.* 199.

114. The registry act of Ohio directs, that all deeds made within the State, shall be recorded "within six months from the actual time of signing or executing of such deeds;" and declares, that if any such deed shall not be recorded, in the county where the land lies, within the time allowed by the act, "the same shall be deemed fraudulent against any subsequent *bona fide* purchaser, for valuable consideration, without notice of such deed." *Steele's Lessee v. Spencer*, 1 *Peters*, 559.

115. In the construction of registry acts, the term "purchaser" is usually taken in its technical, legal sense. It means a complete purchaser, or, in other words, a purchaser clothed with the legal title. *Id.*

116. The statute of Ohio, entitled "an act directing the mode of proceeding in Chancery," declares "that where a decree shall be made for a conveyance, release, or acquittance, &c. and the party whom the decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken in all Courts of law and equity, to have the same operation and effect, and be available, as if the conveyance, release, or acquittance, had been executed conformably to such decree." *Id.*

117. The lands northwest of the river Ohio, between the Scioto and Little Miami, lying west of Ludlow's line, east of Roberts' line and south of the Indian boundary, reserved by Virginia, in her deed of cession to the United States of March 1784, for the satisfaction of the military bounties Virginia had promised, were not, prior to 1810, by any legislative acts of the government of the United States, withdrawn from appropriation under and by virtue of Virginia military land warrants. A patent issued on the 12th of October, 1812, founded upon a military land warrant, for land within the reserved lands, is valid against a claimant of the same land, holding under a sale made by the United States. *Reynolds v. McArthur*, 2 *Peters*, 417.

118. The occupant claimant law of Ohio, which declares that an occupying claimant shall not be turned out of possession, until he shall be paid for lasting and valuable improvements made by him, and directs the Court in a suit at law, to appoint commissioners to value the same; is repugnant to the seventh amendment of the constitution of the United States, which declares that "in suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The compensation for imprisonment is a suit at Common Law, and must be submitted to a jury. *Bank of Hamilton v. Dudley's Lessee*, 2 *Peters*, 492.

LOCAL LAW XIV.

Pennsylvania.

119. The act of Pennsylvania, of 1779, "for vesting the estates of the late proprietaries of Pennsylvania, in this commonwealth," did not confiscate lands of the proprietaries which were within the lines of manors; nor were the same confiscated by the act of 1781, for establishing a land office. *Kirk v. Smith*, 9 *Wheat*, 241.

120. The statute of limitations of Pennsylvania, of 1705, is inapplicable to an action of ejectment, brought to enforce the unpaid purchase money, for lands of the proprietaries within the manors, for which warrants had issued. *Id.* 286.

121. Nor is the statute of limitations of 1785, a bar to such an action. *Id.* 293.

122. A warrant and survey returned into the land office and accepted, in Pennsylvania vests a legal title. *Griffith's Lessee v. Tunkhouser*, 1 *Peters' C. C. R.* 418.

123. A survey of land in the district appropriated to satisfy depreciation certificates, is not void by the provisions of the act of Assembly of 1785; although the survey has not been made by going upon the land and running all the lines; provided the lines of the adjoining survey have ascertained precisely the boundaries of the tract in question, or so many of them as that the remaining lines can be laid down with mathematical certainty. *Id.*

124. A survey made by a deputy surveyor, out of his district, is void, and the patentee cannot recover in ejectment. *Id.*

125. The tract of country appropriated for the satisfying depreciation certificates having been surveyed by authority of the State of Pennsylvania, it was not required that the deputy surveyor should run and mark the lines of a tract anew, in order to apply to it a warrant which came into his hands afterwards. *Id.*

126. To constitute a *settlement* upon lands in "the new purchase," under the provisions of the ninth section of the act of Pennsylvania of April 3d, 1792, there must be an *occupancy*, accompanied by a *bona fide* intention immediately to reside upon the land, either personally or by a tenant; and without this, the mere improvement of the land is of no importance, except as evidence of an intention to settle. *Balfour v. Meade*, 1 *Wash. C. C. R.* 18.

127. The proviso of the 9th section applies only to those who had an incipient title at some time by actual settlement, preceding the necessity which obliged them to require the benefit of the proviso; or by warrant; and such settlement, if so made, would be sufficient, although it were prevented, by the existence of hostilities, from being such a one as this section requires, by the occasion mentioned in the proviso. *Id.*

128. *Actual settlement*, under the 9th section, consists in clearing, fencing, and cultivating two acres of land, at least, on each 100 acres; erecting a house thereon, fit for the habitation of man, and a residence continued for five years, &c. *Id.*

129. The survey made for the plaintiff in this case, gave no title, because, 1. It was not a returnable survey; 2. It was not authorized by a warrant; 3. It was not made for an actual settler; 4. It was not made by an authorized surveyor. *Id.*

130. Although the law of Pennsylvania permits only one warrant to issue to one person, the universal practice of the State, upon which land titles rest, has been different; and one person may take out any number of warrants, in the names of different persons; who are considered as merely nominal, and trustees for the person who pays for their warrants, and their execution. *Huidekoper v. Burrus*, 1 *Wash. C. C. R.* 109.

131. The practice in Pennsylvania has been, where one person takes out a number of warrants to cover a large tract, to describe particularly, in the leading warrant, the tract it is intended to cover; and the other warrants are generally made out as adjoining this and each other. *Id.*

132. The uncertainty of the description in the adjoining warrants, is supplied by the survey; and if this act be performed before any adverse title to the land accrues in a third person, the uncertainty of the warrant forms no objection. *Id.*

133. *Aliter*, if in the meantime another person obtains a special warrant and survey, or settles the tract, thus uncertainly described; for in this case, the subsequent survey of the first warrant holder would not relate back to the date of the warrant, so as to overreach the intermediate title thus acquired. *Id.*

134. The proviso in the act of 1792, only dispenses with the forfeiture incurred, according to the law, by not making the settlement, and continuing it, within and during the time prescribed; and requires that it must be made as soon as the prevention ceases. *Id.*

135. The prevention to settle upon lands in "the new purchase," continued until the end of the year 1795; and after that time, a reasonable time should be allowed to those who claimed titles to lands within the same, for preparing to make settlements. *Id.*

136. The inceptive title of a warrant holder for lands in "the new purchase," is a mere right of possession, to be consummated by a compliance with the requisites of the law; and unless they were performed, no estate vested in him, and he lost his right of possession. *Huidekoper v. McClean*, 1 *Wash. C. C. R.* 136.

137. Upon a forfeiture being incurred, by a non-compliance with the terms of the warrant, no third person could enter on the land; no vacating warrant could issue; as it is provided by the law that it can only issue to an actual settler. *Id.*

138. If a warrant be issued, to *re-survey* land, which was not legally surveyed, it will stand as an original warrant of survey. *Penn's Lessee v. Klyne*, 1 *Wash. C. C. R.* 207.

139. The proprietary of Pennsylvania, by his promise to first purchasers, did not deprive himself of the right to lay off the manor of Springettsbury, north of the city of Philadelphia. *Hurst v. Dunnell*, 1 Wash. C. C. R. 262.

140. The contract for liberty land, between the proprietary and those who entitled themselves to it, by taking up lands in the country, operated severally with each purchaser, and not with the whole, so as to constitute them tenants in common. *Id.*

141. The manor of Springettsbury was known as a manor, prior to 1776; and it was duly surveyed, and returned into the land office, before 4th July, 1776. *Penns v. Klyne*, 1 Wash. C. C. R. 207. *Penns v. Groff*, 1 Wash. C. C. R. 390.

142. Under the act of 1715, if a deed conveyed lands lying in the several counties, it was sufficient that it was recorded in one of the counties. *De Lancey v. McKean*, 1 Wash. C. C. R. 525.

143. A mechanic who has erected a building on the ground of another, under an agreement with the owner to convey the same on ground rent, becomes the equitable owner of the building, and within the provisions of the act of 1803. *Carson v Boudinot*, 2 Wash. C. C. R. 33.

144. The true construction of the acts of 1772, and April 4, 1798, (relative to judgments, and to their lien on real estate,) taken together, is, judgments shall be enrolled when they are signed, and they shall not, by relation, affect *bona fide* purchasers or mortgagees; and as to such persons the lien of the judgment creditor shall cease, unless revived in five years by *scire facias*. *Hurst v. Hurst*, 2 Wash. C. C. R. 69.

145. In Pennsylvania, under the plea of payment with leave, &c. evidence may be given, which shows that *ex æquo et bono*, the debt ought not to be paid. *Latapee, v. Pecholier*, 2 Wash. C. C. R. 180.

146. Under the construction which the act of Pennsylvania of 1705, has received in practice, a foreign attachment will lie for debts contracted in foreign countries, by persons who never did reside in Pennsylvania, and who of course could not properly be said to absent themselves; and which debts, neither by the terms of the contract, nor by the removal of the debtor to that State, could be said to be owing there. *Fisher v. Consequa*, 2 Wash. C. C. R. 382.

147. The remedy by foreign attachment will not lie for demands which arise *ex delicto*, or where special bail cannot regularly be required. The demand must arise under a contract, and the measure of the damages must be such as the plaintiff can aver, by affidavit to be due. *Id.*

148. In ejectment for lands in Pennsylvania against any other person than the proprietary, or one claiming under him, it is not necessary to prove the title out of the proprietaries of Pennsylvania, if a right of entry is proved. *Allen v. Lyons*, 2 Wash. C. C. R. 475.

149. The meaning of the act of 26th March, 1785, section 3d, is this;—If, at the time the law passed, a person was disseised, he was bound to bring his ejectment within fifteen years. But if he was afterwards disseised, the act of limitations, which would begin to run, would not be a bar in less than twenty-one years. *Penns v. Ingham*, 3 Wash. C. C. R. 90.

150. Under the law of Pennsylvania, the defendants, who claimed title to lands by settlement and improvement had no title, if such settlement and improvement were made under the title of Connecticut. *Keene v. Harris*, 3 Wash. C. C. R. 178.

151. The provisions of the insolvent laws of Pennsylvania, passed in 1799, do not extend to estates tail, so as to make a conveyance, executed according to that law, operate as a bar to an estate tail. *Willis' Lessee v. Bucher*, 3 Wash. C. C. R. 369.

152. By the law of Pennsylvania, the Register of Wills is authorized to take the probate of wills, copies of which, with the wills, under his seal, are declared to be matters of record and good evidence. This authority extends to republished wills and codicils, which, in reference to after acquired lands, are as new wills. *Musser v. Curry*, 3 Wash. C. C. R. 481.

LOCAL LAW XV.

Rhode Island.

153. J. J. died in New-Hampshire, seised of real estate in Rhode Island, having devised the same to his daughter, an infant. His executrix proved the will in New-Hampshire, and obtained a license from a probate Court, in that State, to sell the real estate of the testator for the payment of debts. She sold the real estate in Rhode Island for that purpose, and conveyed the same by deed: giving a bond to procure a confirmation of the conveyance by the legislature of Rhode Island. The proceeds of the sale were appropriated to pay the debts of the intestate. Held, that the act of the legislature of Rhode Island, which confirmed the title of the purchasers, was valid. *Wilkinson v. Leland*, 2 *Peters*. 627.

154. The legislative and judicial authority of New-Hampshire were bounded by the territory of that state, and could not be rightfully exercised to pass estates lying in another state. The sale of real estate in Rhode Island, by an executrix, under a license granted by a Court of probate of New-Hampshire, was void; and a deed executed by her of the estate, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. *Id.*

155. By the laws of Rhode Island, the probate of a will, in the proper probate Court, is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the testator. *Id.*

156. By the laws of Rhode Island, as well as of all the New-England states, the real estate of intestates stands chargeable with the payment of their debts upon a deficiency of assets. *Id.*

157. The insolvent act of Rhode Island extends to discharge the party from debts and contracts not yet due, and the bar created thereby applies to the debt or contract, in whatever Court it is sued. *Schieffelin v. Wheaton*, 1 *Gallis*. 441.

158. *Quære*, If the probate of a will in Rhode Island be not conclusive, as well as to real as personal estate? *Spencer et ux. v. Spencer*, 1 *Gallis*. 622.

159. Actions of *forme don* are within the statute of Rhode Island for quieting possessions, and twenty years possession under that statute is a good bar. *Inman v. Barnes*, 2 *Gallis*. 315.

160. A *formedon in descender* is not within the proviso of the statute of possessions of Rhode Island. *Id.*

161. In Rhode Island, the doctrine as to escapes is that of the common law, and the statutes giving the liberty of the limits to prisoners, on giving bonds not to escape, &c. have not altered the common law. *Steere v. Field*, 2 *Mason*, 486.

162. In Rhode Island, an action of debt for an escape is a legal remedy, that action having been incorporated into their laws by implication, from their adoption of the English laws. *Id.*

163. At common law it is not an escape in a gaoler to allow prisoners confined for debt the liberty of all the apartments within the gaol walls, for confinement within the walls is *salva et arcta custodia*. *Id.*

164. *Quære*, Whether it be an escape to allow such prisoners the liberty of the prison limits? *Id.*

165. But it is an escape in the gaoler to make a prisoner for debt a turnkey, and to entrust him with the keys of the outer doors, as well as inner doors, at all times by night and by day. *Id.*

166. If the gaoler be committed to his own gaol, on execution by the sheriff, and no new keeper is appointed, it is an escape of the gaoler, for which the sheriff is accountable; but it is not an escape of the other prisoners, if they are in fact kept in custody under the gaoler's authority or his agents. *Id.*

167. By the registry act of Rhode Island, the recording of the deed is necessary to pass real estate as against third persons, but not as between the original parties or their heirs. *West v. Randall*, 2 *Mason*, 181.

168. Where in Rhode Island a judgment debtor had conveyed his real estate to defraud his creditors, and had afterwards been committed to gaol, and been discharged from imprisonment on taking the poor debtor's oath under the laws of that State, which could only be obtained by a person having no property to support himself in gaol, or to pay prison charges, it was held, that a bill in equity lay to set aside the fraudulent conveyance, and to charge the real estate with the judgment debt, notwithstanding, that by the laws of that State, while the debtor was alive and lived within the State, such real estate could not be directly liable to be taken in execution. *Id.*

169. A judgment debtor is not liable to be attached as a garnishee under the foreign attachment law of Rhode Island. *Franklin v. Ward*, 3 *Mason*, 136.

170. Under the statute of descents of Rhode Island, of 1822, brothers and sisters of the half blood inherit equally with those of the whole blood. *Gardner v. Collins*, 3 *Mason*, 398.

171. Real estate being assets for the payment of debts generally, in Rhode Island, by statute, the executrix may sue the devisee and the purchaser before payment of the debts, to compel them to appropriate the purchase money to the payment of the debts and to exonerate the assets of another devisee entitled to be exonerated. If a purchaser, instead of paying over the purchase money, applies it, with notice of the charge, to the payment of the devisee's own debts, to the injury of the creditors of the deviser, it is misapplication of the purchase money, for which he may be made responsible in equity at the suit of the executrix. *Gardner v. Gardner*, 3 *Mason*, 178.

172. By the statute of Rhode Island of 1798, all deeds, &c. to two or more persons are held to be tenancies in common, unless the words clearly and manifestly show an intention to create a joint tenancy. It was held, that a mortgage to four persons afforded no proof that the parties intended a joint tenancy in the mortgage. *Randall v. Phillips*, 3 *Mason*, 378.

173. The Courts of Probate of Rhode Island cannot appoint a guardian to a person, as incapable of taking care of her estate under the statute of 1798, p. 316, without notice to the party of an adjudication on the facts. *Smith v. Burlingame*, 4 *Mason*, 121.

174. Under the statute of descents of Rhode Island of 1822, where the intestate died seized of an estate, which came to him from his ancestor by descent, and he left no children, but only first and second cousins of the whole blood, it was held that the first cousins were not exclusively entitled to the estate as next of kin, but that the second cousins also were entitled to share by right of representation of their parents. *Dexter v. Dexter*, 4 *Mason*, 302.

LOCAL LAW XVI.

Tennessee and North-Carolina.

175. It is essential to the validity of the sale of lands for taxes, under the laws of Tennessee, that it should appear on the record of the Court, by which the order of sale is made, that the Sheriff had returned that there were no goods and chattels of the delinquent proprietor, out of which the taxes could be made. *Thatcher v. Powell*, 6 *Wheat*. 119.

176. The publications which are required by law to be made, subsequent to the sheriff's return, and previous to the order of sale, are indispensable preliminaries to a valid order of sale. *Id.*

177. Where plats are returned and grants made, without an actual survey, the rule of construction which has been adopted, in order to settle the conflicting claims of different parties, is, that the most material, and most certain calls shall control those which are less material and less certain. *Newson v. Pryor*, 7 *Wheat*. 7.

178. A call for a natural object, as a river, a known stream, a spring, or even a marked line, shall control both course and distance. *Id.*

179. There is no distinction between a *call* to stop at a river, and a *call* to cross a river. *Id.*

180. Where a grant was made for 5000 acres of land, "lying on both sides of the two main forks of Duck river, beginning, &c. and running thence west 894 poles, to a white oak; thence south 894 poles, to a stake *crossing the river*; thence east 894 poles, to a stake; thence north 894 poles to the beginning, crossing the south fork;" it was held, that it must be surveyed so as to extend the second line of the grant such a distance on the course called for as would cross Duck river to the opposite bank. *Id.*

181. A question, under the registry acts of Tennessee, whether a junior conveyance registered, should take precedence of a prior unregistered deed: *Held*, that the registry did not, under the circumstances, vest the title against the elder deed. *Love v. Simms*, 9 *Wheat.* 515.

182. By the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection, only when held under a grant, or under mesne conveyances which connect it with a grant. *Walker v. Turner*, 9 *Wheat.* 541. *Powell v. Harman*, 2 *Peters*, 241.

183. A sheriff's deed, which is void for want of jurisdiction in the Court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the statute of limitations. *Id.*

184. The acts of assembly of North-Carolina, passed between the years 1783 and 1789, invalidate all entries, surveys, and grants of land within the Indian territory, which now forms a part of the territory of the State of Tennessee. But they do not avoid entries commencing without the Indian boundary, and running into it, so far as respects that portion of the land situate without their territory. *Danforth v. Wear*, 9 *Wheat.* 673.

185. The act of North-Carolina of 1784, authorizing the removing of warrants which had been located upon lands previously taken up, so as to place them upon vacant lands, did not repeal, by implication, the previously existing laws, which prohibited surveys of land within the Indian boundary. The lands to which such removals were made, must be lands previously subjected to entry and survey. *Id.* 678.

186. By the laws of Tennessee, a will of lands in another state is not made evidence in an action of ejectment for lands in Tennessee. *Darby's Lessee v. Mayer*, 10 *Wheat.* 472.

187. Under the statute of limitations of Tennessee of 1797, c. 43, s. 4, peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant, or deed of conveyance founded upon a grant, gives a complete title to the person who has the possession. *Piles v. Bouldin*, 11 *Wheat.* 325.

188. *Quare*, Whether the doctrine of this Court, as to the effect of the terms "beyond seas," in the saving clause of a statute of limitations, being equivalent to *without the limits of the State* where the statute is enacted, has been received in the local Courts of Tennessee? *Shelby v. Guy*, 11 *Wheat.* 367.

189. Under the act of North Carolina of 1782, for the relief of the officers and soldiers in the continental line, &c., the commissioners having determined that the *French lick* was within the reservations of the statute, as public property, and having surveyed the said reservation in 1784, the same was protected from individual survey and location, although it exceeded the quantity of 640 acres. *Edwards' Lessee v. Darby*, 12 *Wheat.* 206.

190. The *French lick* reservation has not been since subject to appropriation, by entry and survey, as vacant land, by any subsequent statute of North Carolina or Tennessee. *Id.*

LOCAL LAW XVII.

Virginia and Kentucky.

- (A) *The law of real property in general.* (B) *Statutes of wills and descents.*
 (C) *Bills of exchange and promissory notes.* (D) *Other local laws.*

(A) *Laws of real property in general.*

191. The rule applied in equity to the relief of *bona fide* purchasers without notice, is not applicable to the case of purchasers of military land warrants under the laws of Virginia. *Kerr v. Watts*, 6 *Wheat.* 550.

192. Such purchasers are considered as affected with notice by the record of the entry, and also of the survey, and subsequent purchasers are considered as acquiring the interest of the person making the entry: so that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the rule, as to innocent purchasers, does not apply. *Id.*

193. The principle, that only parties or privies, or purchasers *pendente lite*, are bound by a decree in equity, how applied to this case. *Id.*

194. The surveys actually made on the military land warrants of Virginia, have not the force of judicial acts, or of acts done by the deputations of officers as general agents of the continental officers. *Id.*

195. A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title, until the consummation of the title by a grant, the person who acquires an equity holds a right, subject to examination. *Miller v. Kerr*, 6 *Wheat.* 1.

196. Where the register of the land office of Virginia had, by mistake, given a warrant for military services in the *Continental* line, on a certificate authorising a warrant for services in the *State* line, and in recording it, pursued the certificate, and not the warrant, it was held that this Court could not support a prior entry and survey, on a warrant thus issued by mistake, against a senior patent. *Id.*

197. Where the plaintiffs seek to set aside the legal title, because they have the superior equity, it is consistent with the principles of the Court to rebut this equity by any circumstances which may impair it; and the legal title cannot be made to yield to an equity founded on the mistake of a ministerial officer. *Id.*

198. The patent issued on a military warrant under the law of Virginia, is *prima facie* evidence that every prerequisite of the law was complied with. *Bouldin v. Massie*, 7 *Wheat.* 122. 148.

199. The loss of a paper must be established before its contents can be proved; but where the patent issues upon an assignment of the warrant, and the legal title is thus consummated, the assignment itself being no longer a paper essential to that title, the same degree of proof of its existence cannot be required as if it were relied on as composing part of the title. *Id.* 154.

200. Where there is a strong degree of probability that the assignment has been lost or destroyed, through accident, its non-production by the party claiming under it, ought not to operate against him, so as to defeat his legal title. *Id.* 155.

201. The original law of Virginia, which authorizes the assignment of warrants, did not require, that it should be made by endorsement, or by an instrument annexed to the warrant. *Id.* 156.

202. A question on the validity of a certificate for a settlement right in Kentucky, and of the entry thereof in the surveyor's office. *Crockett v. Lee*, 7 *Wheat.* 522.

203. It is a settled rule, that the decree must conform to the allegations in the pleadings, as well as the proofs in the cause. *Id.* 525.

204. Therefore, when the question is on the validity of a location, and neither its vagueness nor its certainty are distinctly put in issue, by the pleadings, the testimony to that point will be disregarded by this Court; but if the merits appear to justify it, the cause will be remanded to the Court below, with directions to permit the pleadings to be amended. *Id.* 525.

205. The land law of Virginia, of 1779, makes a pre-emption warrant superior to a treasury warrant, whenever they interfere with each other, unless the holder of the pre-emption warrant has forfeited that superiority, by failing to enter his warrant with the surveyor of the county, within twelve months after the end of the session at which the land law was enacted; and on that period having expired, and being prolonged by successive acts, during which time there was one interval between the expiration of the law and the act of revival, the original right of the holder of the pre-emption warrant was preserved, notwithstanding that interval, the entry of the holder of the treasury warrant not having been made during the same interval. *Stevens v. M^c Cargo*, 9 *Wheat.* 502.

206. Secondary evidence of the contents of written instruments is not admissible, when the originals are within the control or custody of the party; and this rule of evidence is not dispensed with by the local statutes of Kentucky, which provide that no person shall be permitted to deny his signature, as maker or assignor of a note, in a suit against him, unless he will make an affidavit denying the execution or assignment. These statutes do not dispense with proof of the existence of the instrument, or of the right of the party to hold it by assignment. *Sebree v. Dorr*, 9 *Wheat.* 558.

207. Under the following entry, "H. R. enters 2000 acres in Kentucky, by virtue of a warrant for military services performed by him in the last war, in *the fork of the first fork of Licking*, running up each fork for quantity;" it appeared in evidence, that at the first fork of Licking, the one fork was known and generally distinguished by the name of the south fork, and the other by the name of the main Licking, or the Blue Lick fork, and that some miles above this place the south fork again forked: *Held*, that the entry could not be satisfied with lands lying in the first fork. *Meredith v. Picket*, 9 *Wheat.* 573.

208. In such a case, the entry could not be explained, and the survey supported, by oral testimony. The notoriety and names of places may be shown by such testimony, but the words of an entry are to be construed by the Court as any other written instrument. *Id.* 575.

209. In Kentucky, a survey must be presumed to be recorded at the expiration of three months from its date, and an entry dependent on it is entitled to all the notoriety of the survey as a matter of record. *Elmendorf v. Taylor*, 10 *Wheat.* 152.

210. An entry in the following words, "W. D. enters 8,000 acres, beginning at the most southwestwardly corner of D. R.'s survey of 8,000 acres, between Floyd's Fork and Bull Skin; thence along his westwardly line to the corner; thence the same course with J. R.'s line north 2 degrees west, 964 poles, to a survey of J. L. for 22,000 acres; thence with Lewis' line, and from the beginning south 7 degrees west till a line parallel with the first line will include the quantity," is a valid entry. *Id.*

211. Such an entry is aided by the notoriety of the surveys, which it calls to adjoin, where those surveys had been made three months anterior to its date. *Id.*

212. The following entry, "J. T. enters 10,000 acres of land, on part of a treasury warrant, No. 9,739, to be laid off in one or more surveys, lying between Stoner's fork, and Hingston's fork, about six or seven miles nearly northeast of Harrod's lick, at two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's fork, on the east side of the branch, then running a line from the said ash saplings, south 45 degrees east, 1,600 poles, thence extending from each end of this line north 45 degrees east, down the branch, until a line nearly parallel to the beginning line shall include the quantity of vacant land, exclusive of prior claims," is not a valid entry, there being

no proof that the "two white-ash saplings, from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hington's fork," had acquired sufficient notoriety to constitute a valid call for the beginning of an entry, without further aid than is afforded by the information that the land lies between those forks. *M'Dowell v. Peyton*, 10 *Wheat*. 454.

213. The following entry is invalid for want of that certainty and precision which the local laws and decisions require: "January 27th, 1783, J. C. L. enters 20,000 acres of land on twenty treasury warrants, No. 8,859, &c. beginning at the mouth of a creek falling into the main fork of Licking, on the north side below some cedar cliffs, and about 35 miles above the upper Blue Licks, and running from said beginning up the north side of Licking, and bounding with the same as far as will amount to 10 miles when reduced to a straight line, thence extending from each end of said reduced line, a northerly course at right angles to the same for quantity. *Littlepage v. Fowler*, 11 *Wheat*. 215.

214. An entry calling for the land to lie on the east side of Slate creek, a southwest branch of the main fork of Licking, "beginning where a buffalo road crosseth said creek at the mouth of a branch emptying into said creek at the northeast side, it being the place of beginning for S. M.'s entry for 20,000 acres," is defective in certainty and precision; and its defects are not aided by the reference to S. M.'s entry for "20,000 acres, lying on the west side of Slate creek, southwest branch of Licking creek, beginning where the buffalo road crosses Slate creek, at the mouth of a branch, emptying in on the east side thereof; there are several cabins," &c. "to include a quantity of fallen timber," &c. *Taylor's Devisee v. Owing*, 11 *Wheat*. 226.

215. The act of Assembly of Virginia, of 1779, c. 13, s. 3, secured from escheat all the interest acquired by aliens in real property, previous to the issuing of the patent, and left the rights acquired by them under the patent, to be determined by the general principles of the Common Law. *Gouverneur's heirs v. Robertson*, 11 *Wheat*. 332.

216. The title of an alien thus acquired by patent in 1784, under the laws of Virginia, and subsequently confirmed to him by a legislative act of Kentucky in 1796, and to his heirs and their grantees by an act of the State in 1799, will overreach a grant made by Virginia to a citizen in 1785, and defeat the claims of all persons holding under such grant. *Id.*

217. These legislative acts of Kentucky were valid, under the compact of 1789, between the States of Virginia and Kentucky. *Id.*

218. *Quære*, Whether the compact of 1789, between Virginia and Kentucky, restrained the legislature of Kentucky from prolonging the time for surveying one entry to the prejudice of another? *Millen v. McIntire*, 11 *Wheat*. 441.

219. By the construction of the act of Kentucky of 1797, granting further time for making surveys, with a proviso, allowing to infants, &c. three years after their several disabilities are removed, to complete surveys on their entries; if any one or more of the joint owners be under the disability of infancy, &c. it brings the entry within the saving of the proviso, as to all of the other owners. *Id.*

220. A question in equity as to the title to a lot of land in the town of Lexington, Kentucky, reserved as public property and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed under the circumstances of the case. *McConnell v. The town of Lexington*, 12 *Wheat*. 582.

221. The reservation contained in the law of Virginia of October 1783, ceding to Congress the territory northwest of the Ohio, is not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the southeast side of the Ohio. The residue of the lands are ceded to the United States as a common fund for the use and benefit of such States as have or shall become members of the confederation, to be faithfully and *bona fide* disposed of for that purpose. *Jackson v. Clark*, 1 *Peters*, 634.

222. Although the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object which was also of vital interest. This was to be effected only, by prescribing the time within which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust. *Id.* 635.

223. The privy examination and acknowledgment of a deed, by a *feme covert* so as to pass or convey her estate, cannot be legally proved by parol testimony. *Elliot v. Piersol*, 1 *Peters*, 338.

224. In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery, have never been in common use; and in those States, the capacity of a *feme covert* to convey her estate by deed, is the creature of statute law; and to make her deed effectual, the forms and solemnities, prescribed by the statutes, must be pursued. *Id.*

225. The Virginia statute of 1748, ch. 1st, declares the law to be, "that where any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed. *Id.* 339.

226. In action of ejectment to recover land in Kentucky, the law of real estates in Kentucky is the law of this Court, in deciding on the rights of the parties. *Davis v. Mason*, 1 *Peters*, 505.

227. It seems that the rigid rules of the Common Law do not require that the husband shall have had actual seisin of the lands of the wife, to entitle himself to a tenancy by curtesy, in waste, or what is commonly styled "wild lands" *Id.* 506.

228. If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists. *Id.* 508.

229. At present it is fully settled in equity, that the husband shall have curtesy of trust, as well as of legal estates, of an equity of redemption, of a contingent use, or money to be laid out in lands. *Id.* 508.

230. An entry was made "so as to join the settlements on the north, east, and south sides thereof, so as not to run into the old military surveys which are legal." The rules which are settled in Kentucky, would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north, east, and south sides of the settlement; the whole land to be included by rectangular lines. The old military survey must, therefore, be so contiguous to the settlement, as to stop one or two of those lines. A subsequent locator knew where to look for them, and the testimony informs us, that he would encounter no difficulty in finding them. The evidence is, that they were well known; and that the lines were plainly marked, so as to be traced without difficulty. We consider the last words of the entry, "which are legal," merely as an affirmation that they are so, not as leaving it doubtful; and consequently, that they make no change in the entry. *Hunt v. Wickliffe*, 2 *Peters*, 201.

231. Under the laws of Virginia, the certificate of registry of a patent, which is required to be given, is not necessary to the title to lands under it. The law is as to this matter merely directory. *Ritchie v. Woods*, 1 *Wash. C. C. R.* 11.

232. By the decisions of the Courts of Virginia, a right of settlement cannot prevail against a right under a patent. *Id.*

(B) *Statutes of wills and descents.*

233. Under a law of the State of Kentucky, and the decision of their Courts upon it, a will with two witnesses, is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Davis v. Mason*, 1 *Peters* 508.

234. It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it. *Id.* 509.

(C) *Bills of exchange and promissory notes.*

235. Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment debts, a joint endorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his co-endorser, with the priority of a judgment creditor. *Lidderdale v. Robinson*, 12 *Wheat.* 595.

(D) *Other local laws.*

236. Under the act of assembly of Virginia, the defendant may enter special bail, and defend the suit at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharges the appearance bail. *Bartle v. Coleman*, 6 *Wheat.* 475.

237. If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to; but the defendant cannot appear and consent to a reference, the report and judgment on which is to bind the appearance bail as well as himself. Such a joint judgment is erroneous, and will be reversed as to both. *Id.*

238. Under the laws in relation to the Mutual Assurance Society of Virginia, property offered for insurance, on which the premium has not been paid, and which is sold without notice, is not liable for the premium in the hands of the vendee. *The Mutual Assurance Society Co. of Va. v. Faxton*, 6 *Wheat.* 606.

239. The act of assembly of Kentucky, of the 7th of February, 1812, "giving interest on judgments for damages, in certain cases," applies as well to cases depending in the Circuit Courts of the Union, as to proceedings in similar cases in the State Courts. *Sneed v. Wister*, 8 *Wheat.* 690.

340. The party is as well entitled to interest in an action on an appeal bond, as if he were to proceed on the judgment, if the judgment be on a contract for the payment of money. He is entitled to interest from the rendition of the original judgment. *Id.*

241. Five years *bona fide* possession of a slave constitutes a title, by the laws of Virginia, upon which the possessor may recover, in detinue; and this title may be set up by the vendee of such possessor, in the Courts of Tennessee, as a defence to a suit brought by a third party in these Courts. *Shelby v. Guy*, 11 *Wheat.* 361.

242. *Quære*, Whether a parol gift of slaves was valid by the laws of Virginia previous to the act of assembly of 1787? *Id.*

243. On the construction of the statute of Virginia, emancipating slaves brought into that State in 1792, unless the owner removing with them should take a certain oath within sixty days after such removal, the fact of the oath having been taken may be presumed by the lapse of twenty years, accompanied with possession. *Mason v. Matilda*, 12 *Wheat.* 590.

244. By the act of assembly in Virginia in 1792, a confession of judgment is equivalent to a release of errors. *Mandeville v. Suckley*, 1 *Peters*, 137.

245. The execution law of Virginia prescribes that the forthcoming bond shall recite the material parts of the execution on which it is taken, but gives no other direction respecting the notice, than that it shall be served ten days before the motion. Its sole purpose is to inform the party that the motion is to be made, thereby enabling him to show that the money has been paid; or, that for any other reasons, execution ought not to be awarded. If it gives him the information, which enables him to do this, it effects all the substantial purposes of justice. *Alexander v. Brown*, 1 *Peters*, 684.

MARSHAL.

1. The fees and compensation to the Marshal, where the government is a party to the suit, and his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the Court, or one of the judges. *The Antelope*, 12 *Wheat*. 550.

2. The marshal may have an attachment to enforce the payment of his fees of office, against suitors in the Court. *Anonymous*, 2 *Gallis*. 101.

3. So against an attorney who endorses the writ, and who by the *lex loci* is liable to respond the costs. *Id.*

4. The marshal is entitled to his full commissions, according to the act of February 28th, 1799, ch. 125, upon all interlocutory sales of prize property. The act of January 27th, 1813, ch. 479, applies only to sales after final condemnation. *The Avery*, 2 *Gallis*. 308.

5. It is the duty of the marshal upon all interlocutory sales, to bring the proceeds into Court, with a regular account of the sales. *Id.*

6. The marshal is entitled to commissions upon prize property, removed from his district by consent of parties, and there sold. *The San Jose Indiano*, 2 *Gallis*. 311.

7. The Court will not dictate to the marshal, what return he shall make to process in his hands. He must make his return at his peril, and any person injured by it, may have his legal remedy for such return. *Wortman v. Conyngham*, 1 *Peters'* C. C. R. 241.

8. It is not a sufficient return to a *venditioni exponas*, "that A. B., to whom the property was struck off at the sale, has neglected or refused to comply with the terms of sale." It is the duty of the marshal, to offer the property at sale again, if he had time to do so; and if not, by a proper return, enable the plaintiff to take out an *alias venditioni exponas*. *Id.*

9. The return of the marshal to a writ cannot be traversed in an action between the parties to the suit in which the writ issued. *Wilson v. Hurst*, 1 *Peters*, C. C. R. 441.

10. The marshals of the several districts, are the proper officers to execute the orders of the president, under the act of Congress of 6th July 1798, relative to alien enemies. *Lockington v. Smith*, 1 *Peters'* C. C. R. 466.

4. After the President had established such regulations, as he deemed necessary in relation to alien enemies, it was not necessary to call in the aid of the judicial authority on all occasions to enforce them, and the marshal could act without such authority. *Id.*

PARTNERSHIP.

1. One partner during the continuance of the partnership, is competent to submit to reference his own interest in the firm, but he cannot, by his submission, bind his partners. *Karthauss v. Ferrer*, 1 *Peters*, 228.

2. A dissolution of partnership puts an end to the authority of one partner to bind the others. By the force of its terms it operates as a revocation of all power to create new contracts; and the rights of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified, and restrained by the express delegation of the whole authority to one of the partners. *Bell v. Morrison*, 1 *Peters*, 370.

3. If one partner contracts with a third person, in the name of the firm, after dissolution, but that fact not made public or known by such third person, the law considers the contract as being made with the firm, and upon their credit. But if the partner deal with another in his individual name, and upon his sole responsibility, without even an allusion to the partnership, it was unimportant to that other to know that the partnership was dissolved; since he was dealing, not with the firm, and upon their credit, but with the individual with whom he was contracting, and upon his credit. *Le Roy, Bayard & Co. v. Johnson, 2 Peters, 186.*

4. A debtor to a partnership cannot be held as trustee for the several or joint debts of one of the partners. *Lyndon v. Gorham, 1 Gallis. 367.*

5. The corporeal property cannot be taken in execution to satisfy the several debts of one partner, unless such partner would have an interest in the property after settlement of all accounts: and then to the extent of that interest only. *Id.*

6. A bill to charge the executors of a deceased partner with a partnership debt, where the other partner survives, must expressly charge an insolvency of the survivor. *Van Reimsdyk v. Kane, 1 Gallis. 371.*

7. The share of a partner domiciled in the enemy's country, is subject to condemnation as prize. *The San Jose Indiano, 2 Gallis. 268. The Francis, 1 Gallis. 618.*

8. Equity will enforce against the executors of a deceased partner or joint contractor, payment of a bill of exchange, where the survivors are insolvent. *Van Reimsdyk v. Kane, 1 Gallis. 630.*

9. If one partner, in a voyage on joint account, be authorized by the others to take up money on the credit of the whole concern, and draw bills therefor on a house at Amsterdam, and the partner take up money and draw a bill for the same, directing it to be charged to the account of all the partners, but it is signed by himself only, it seems, such bill is binding on all the partners; at least, equity will enforce payment thereof against all the partners in favor of the payee of the bill, who has trusted the money on the faith of the joint credit. *Id.*

10. In equity, such a bill, drawn under such circumstances, would be deemed to have been guarantied as to acceptance and payment, by all the partners. The statute of frauds does not apply to such a case; for the guaranty is not for the payment of the debt of another, but of the debt of the guarantors. *Id.*

11. If no original authority to draw were given, but subsequently the whole transaction was ratified by all the partners, such ratification would be equivalent to an original authority. *Id.*

12. In cases of partnership, the confession of one partner in relation to a partnership concern, is in general admissible in an action against the other. It is not evidence to prove the partnership itself; but that being once admitted or proved aliunde, the confession is then let in for all collateral purposes. *Id. Corps v. Robinson, 2 Wash. C. C. R. 398.*

13. Where a shipment is made by one of several joint partners, to another partner, resident in a different country, in the ordinary course of their trade, it must be held to be on joint account, unless the presumption is conclusively repelled by proof of a shipment on the exclusive account of one. *The Francis, 1 Gallis. 618. The San Jose Indiano, 2 Gallis. 268.*

14. A and B were tenants in common with C and D of a ship in certain proportions, and purchased a cargo, by an agreement, on their account in the like proportions for a voyage, and consigned the same to the master for sale and returns; it was held, that they were tenants in common of the cargo and not partners. *Jackson v. Robinson, 3 Mason 138.*

15. Where a firm put a debt, after the dissolution of the partnership, at the disposal of one partner, and gave information of it to the debtor, such partner has a right to assign it as security for his private debt, and in equity the assignee may maintain a suit for it against the debtor. *M^r Lanahan v. Ellery, 3 Mason, 269.*

16. A general assignment is valid for actual liabilities, as well as for debts due, if the parties so intend. One partner may sign and seal such an assignment for the

firm, and it will bind the partnership, as a release of the debt. *Halsey v. Whitney*, 4 *Mason*, 206.

17. A purchaser under an execution against one partner, becomes a tenant in common with the other partners, in an undivided share of the land purchased, subject to all the rights of the other partners. Until the partnership debts are paid, he can have no claim, but on the separate interest of the individual partner in the residue. *Gilmore v. North American Land Company*, 1 *Peters' C. C. R.* 460.

18. To constitute a settled account upon which one partner may sue another, all the parties must consent to it, and be bound by it. *Lamelere v. Cuze*, 1 *Wash. C. C. R.* 435.

19. *Indebitatus assumpsit* cannot be maintained by one partner against another, until the partnership is dissolved, balance struck, and a promise to pay. *Id.*

20. It is the joint interest in the whole, which constitutes the joint liability of all, for the contracts of one; and not the credit which is given to all, as in the instance of a dormant partner. *Felichy v. Hamilton*, 1 *Wash. C. C. R.* 491.

21. Where money is remitted to a firm, which in fact belongs to one of the partners and a third person, the interest of such third person cannot be affected by the entering the amount in the partnership books, to the credit of the partner concerned in interest, and who was largely indebted to the concern. *Vanderwick v. Summerl*, 2 *Wash. C. C. R.* 41.

22. Where a loss is sustained by the act of a partner, done in good faith, although contrary to the advice of the other partner, he is not responsible. *Lyles v. Styles*, 2 *Wash. C. C. R.* 224.

23. Entries made in the partnership books after a dissolution, may be given in evidence against the party who made them, but not otherwise. *Simonton v. Boucher*, 2 *Wash. C. C. R.* 473.

24. One of several co-obligors or joint contractors, cannot be charged singly, if, in due time, he takes advantage of the plaintiff's omission to sue the others, by a plea in abatement; but he cannot take advantage of the omission at the trial. *Jordan v. Wilkins*, 3 *Wash. C. C. R.* 110.

25. An agreement between two, by which each was to carry on trade upon his own capital, credit, and responsibility, and that each was to bear his own loss, but the profits were to be divided, is not a partnership as between themselves, or as to strangers knowing the true nature of the connexion between them. *Id.*

26. B and I, partners, being indebted to the United States for duties, B executed a bond for the debt, in his separate name. B and I afterwards made a voluntary assignment of their property to the defendants, for the use of their creditors; and B assigned his estate for the use of his separate creditors. Before the bond was given, B and I authorized, in writing, each to execute custom-house bonds for duties, each one of the partners agreeing to be bound for the payment of the bonds, as if executed by both. This action was instituted, (*indebitatus assumpsit*,) against the assignees of B and I, to recover the amount of the bond given by B to the United States, out of the partnership effects of B and I. *Held*, that it would not lie. *U. States v. Astley et al.* 3 *Wash. C. C. R.* 508.

27. The bond is not evidence of a debt due by B and J, because not signed by them; nor of a debt due by I, because not signed by him. *Id.*

28. One partner cannot by deed, bind his co-partner; unless executed in his presence, and by his consent. *Id.*

PAYMENT.

1. A person owing money under distinct contracts, has a right to apply his payments to whichever debt he may choose, and this power may be exercised without any express direction given at the time. *Taylor v. Sandiford*, 7 *Wheat.* 13:

2. A direction may be evidenced by circumstances as well as by words: and a positive refusal to pay one debt, and acknowledgment of another, with a delivery of the sum due upon it, would be such a circumstance. *Id.*

3. In general, the debtor has a right to make the appropriation of payments; if he omits it, the creditor may make it; but neither party has a right to make an appropriation after the controversy has arisen. *United States v. Kirkpatrick*, 9 *Wheat.* 720.

4. In cases of long and running accounts, where balances are adjusted merely for the purposes of making rests, the law will apply payments to extinguish the debts, according to the priority of time. *Id.*

5. In general, a payment received in forged paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. *United States Bank v. Bank of Georgia*, 10 *Wheat.* 333.

6. But this principle does not apply to a payment made *bona fide* to a bank, in its own notes, which are received as cash, and afterwards discovered to be forged. *Id.*

7. In case of such a payment upon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank upon their general account, either upon an *insimul computassent*, or as for money had and received. *Id.*

8. Bank notes are a part of the currency of the country; they pass as money, and are a good tender, unless specially objected to. *Id.*

9. Where a sum of money was payable "at such periods as the bank may approve," the time of payment being left to the option of the bank, the money is, in judgment of law, payable on demand. *Bank of Columbia v. Hagner*, 1 *Peters*, 463.

10. If a debtor deposit money for his creditor with a third person, and the creditor assents thereto, or gives the depositary a new credit upon the footing of such deposit, the original debtor is discharged. *Swift v. Hathaway*, 1 *Gallis*. 417.

11. Treasury notes issued under the act of Congress of 1814, ch. 77, and ch. 699, being by their terms receivable in payment of duties, taxes, and land debts, due to the United States, for the principal and interest due thereon, are a good tender, and may be pleaded as such to such debts. *Thorndike v. U. States*, 2 *Mason*, 1.

12. A receipt in full of all demands is open to inquiry and explanation. *Harden v. Gordon*, 2 *Mason*, 541. *Thompson v. Faussat*, 1 *Peters' C. C. R.* 182. *Maze v. Miller*, 1 *Wash. C. C. R.* 328.

13. Where there are items of debt and credit, in a running account between the Postmaster-General and the deputy Postmasters, in the absence of any specific appropriation by either party, the credits are to be applied to the discharge of the debts antecedently due, in the order of the account. *Postmaster-General v. Furber*, 4 *Mason*, 333.

14. During the reign of Charles IV. of Spain, Hope and Company of Amsterdam negotiated a loan, for, and on his account, for the re-payment of which, the revenues of Spain were pledged. Duties, which were payable to the King of Spain, on the export of merchandise to the Spanish possessions in America, came, legally, into the hands of Hope and Company, and were by them applied to the liquidation of the loan. *Held*, that these duties were a part of the revenues of the crown of Spain, pledged for the re-payment of the loan; and such an appropriation by Hope and Company, was proper. *King of Spain v. Oliver*, 1 *Peters' C. C. R.* 276.

15. Bonds, assigned to be applied to the discharge of a debt for which a suit is brought, although they are not returned to the assignor, cannot be given in evidence on the plea of payment, it being proved that the consideration of the bonds had failed, and that they had been acknowledged by the assignor to be of no value. *Wilson v. Hurst*, 1 *Peters' C. C. R.* 441.

16. A payment which might have been pleaded to the original *scire facias* to revive a judgment, cannot be given in evidence in a second *scire facias*. *Id.*

17. A bill of exchange remitted in payment of a debt due to the person to whom it is sent, where the amount of the bill is lost by the negligence of the person to whom it was transmitted, is to be considered as payment of the debt. *Roberts v. Gallagher*, 1 Wash. C. C. R. 156.

18. A bill or note is not payment, unless it were received in satisfaction, and the receiver agreed to run all risks; or, by his after conduct, made it his own. *Maze v. Miller*, 1 Wash. C. C. R. 328. *Gallagher v. Roberts*, 2 Wash. C. C. R. 191.

19. The correct rule is, that the interest should be calculated whenever a payment is made, to which the payment is first to be applied, and if it exceed the interest, the balance is to be applied to diminish the principal. If it fall short of the interest, the balance of interest should not be added to the principal, so as to produce interest. This rule applies both to debts whose interest is of course to be charged, and to those in which interest is given by way of damages. *Smith v. Shaw's Adm'rs*, 2 Wash. C. C. R. 168.

20. If, when a party is about to tender a sum of money, the person to whom it is intended to pay it, declares he will not receive it, it is not necessary that the money should be actually produced. *Barker v. Parkenhorn*, 2 Wash. C. C. R. 142.

21. If a debtor remit a bill to his creditor, in payment of the debt, and he receives it as such, and credits the debtor, it is a payment, and he can only sue the debtor as endorser; and if he neglects to present it in time for acceptance and payment, and to give notice of its dishonour, he makes the debt his own, whether the drawer had funds of the drawee or not. *Denniston v. Imbrie*, 3 Wash. C. C. R. 396.

PLEADING.

- I. *Parties to the suit.*
- II. *Declaration.*
- III. *Pleas.*

PLEADING I.

Parties to the suit.

1. In order to maintain a suit in the Circuit Court, the jurisdiction must appear on the record; as if the suit is between citizens of different States, the citizenship of the respective parties must be set forth. *Sullivan v. The Fulton Steam Boat Company*, 6 Wheat. 450.

2. Where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered as a party on the record. *Governor of Georgia, v. Madrazo*, 1 Peters, 123.

3. The 11th section of the judiciary act of 1789, ch. 20, must be construed in connexion with and in conformity to the constitution of the United States. By the latter, the judicial power is not extended to private suits, in which an alien is a party, unless a citizen be the adverse party. It is therefore indispensable to aver the citizenship of the defendants, in order to show on the record the jurisdiction of the Court. *Jackson v. Twentymann*, 2 Peters, 136.

4. A native citizen of Rhode Island, whose father was dead, but whose mother lived on the family estate in Rhode Island, went to New-York to reside as a merchant, and there failed, and afterwards returned to his mother's family and resided there, being unmarried. At the time when the suit was brought he was in a store in Connecticut, acting as clerk there for his brother. He was sued as a citizen of Rhode Island. There being no proof that he intended a permanent residence in

Connecticut, it was held by the Court upon these facts, that he was a citizen of Rhode Island. *Catlin v. Gladding*, 4 *Mason*, 308.

5. A agrees to pay a sum of money, or do a certain act, for the use of B and C. A suit from this contract cannot be supported in the name of either of the parties only, but in the name of B and C jointly. *U. States v. Kennan*, 1 *Peters' C. C. R.* 168.

PLEADING II.

Declaration.

6. It is in general, not necessary, in deriving title to a bill or note, through the endorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons comprising the firm. *Childress v. Emory*, 8 *Wheat.* 642.

7. A declaration averring that "J. C., by his agent, A. C., made" the note, &c. is good. *Id.*

8. Debt, against an executor, should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit*. *Id.*

9. An action of debt lies, upon a promissory note, against executors. *Id.*

10. In a declaration upon a promissory note, the omission of the place where it is payable is fatal. *Sebree v. Dorr*, 9 *Wheat.* 558.

11. Where, by the local law and usage, payment of a promissory note is demandable on the fourth day of grace, in order to charge the endorser, the declaration against the endorser must lay the demand on the fourth, and not on the third day. *Remmer v. Bank of Columbia*, 9 *Wheat.* 581.

12. *Quare*, Whether a declaration, in such a case, not averring the local usage, would be good upon demurrer. *Id.*

13. To admit secondary evidence of a lost note, it is not necessary that there should be a count in the declaration as upon a lost note. *Id.*

14. In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount; but no formal terms are prescribed in which the averment is to be made. *Day v. Chism*, 10 *Wheat.* 449.

15. Where it was averred in such a declaration, "that the said O. had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law," it was held sufficient as a substantial averment of an eviction by title paramount. *Id.*

16. Where the plaintiffs declared in covenant both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, it was held not to be fatal on general demurrer. *Id.*

17. Such a defect may be amended under the 32d section of the judiciary act of 1789, c. 20. *Id.*

18. Where there is a special agreement open and subsisting at the time the cause of action arises, a general *indebitatus assumpsit* cannot be maintained. *Perkins v. Hurt*, 11 *Wheat.* 237.

19. But, if the agreement has been wholly performed, or if its further execution has been prevented by the act of the defendant, or by the consent of both parties; or, if the contract has been fully performed in respect to any one distinct subject included in it; the plaintiff may recover upon a general *indebitatus assumpsit*. *Id.*

20. Circumstances distinguishing a count in *detinue* from a count in *trover*. *Shelby v. Guy*, 11 *Wheat.* 361.

21. In suits for an indivisible thing, a right of action survives to a tenant in common. *Id.*

22. No action at law will lie on the decretal order of a Court of Equity. *Hugh v. Higgs*, 8 *Wheat.* 697.

23. The declaration in a suit against one partner only, never gives notice of the action being on a partnership transaction. He is always proceeded against as if he

were the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. *Barry v. Fosles*, 1 *Peters*, 317.

24. That it is not necessary in an action upon a judgment recovered in favour of an administrator, that the plaintiff name himself as administrator, follows from his not being bound to make a profert of the letters of administration; and when he does so name himself, it may be rejected as surplusage. *Biddle v. Wilkins*, 1 *Peters*, 692.

25. An administrator may sue and recover upon a judgment obtained by him in his representative character, in his own name, the judgment being considered as a debt due to him in his personal capacity, he being answerable for it to the estate of the intestate. *Id.* 687. 693.

26. In contracts for the sale of land, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. *Bank of Columbia v. Hagner*, 1 *Peters*, 464.

27. If either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal; and an averment to that effect, is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof. *Id.* 465.

28. The time fixed for performance, is, at law, deemed of the essence of the contract. And if the seller is not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end. *Id.* 465.

29. It may be laid down as a settled rule, that at law, to entitle the vendor to recover the purchase money, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser. *Id.* 467.

30. If a declaration on a penal statute do not conclude "against the form of the statute," it is a fatal omission on error. Alleging "whereby, and by force of such act," the defendant had forfeited, &c. is not sufficient. *Sears v. United States*, 1 *Gallis*. 257. [*Cross v. United States*, 1 *Gallis*. 26.]

31. If several acts are mentioned in such a declaration and it be alleged, that "by force of said act," without designating the particular act, the forfeiture hath accrued, &c. it seems that it is not fatal on error. *Id.*

32. It seems also, that such a declaration need not specify the uses, to which the forfeiture enures. *Id.*

33. A conclusion of a declaration of debt for a penalty under a statute, "against the law in such case made and provided," is not a conclusion against the form of a statute, and is bad on error. *Smith v. United States*, 1 *Gallis*. 261.

34. If two penal offences are described in one count, and one penalty only is sought, after verdict, the declaration will be supported. *Id.*

35. In debt for the penalty of the double value, under the embargo act, 1808, ch. 8, it need not be averred in the declaration, that the vessel and cargo had not been and could not be seized for the offence. *Id.*

36. If a declaration for a statute penalty conclude "against the form of the statutes," when it is founded on a single statute, it is good on error. *Kenrick v. United States*, 1 *Gallis*. 268.

37. But where an offence depends on several statutes, a conclusion against the form of a single statute is bad. *Id.*

38. In an information on the 50th section of the collection act of 1799, ch. 128, it is necessary to allege that the goods were unladen in some port or place within a collection district, without a permit from the collector of that port or district. But it will be sufficient if the fact be so, to allege the port or district to be to the attorney unknown. *United States v. Burnham*, 1 *Mason*, 57.

39. Material matter, although alleged under a *videlicet*, is traversable, and must be proved as laid. *Id.*

40. Where an indictment alleged the purport of a written paper to be, that the vessel of the burthen of 14 tons 45-95ths of a ton, whereas the paper produced, stated it to be 14 tons and 50-95ths of a ton, the variance was held fatal. *United States v. Lakeman*, 2 *Mason*, 229.

41. In an indictment for forgery, it is in general necessary to set forth the tenor of the instrument; and it must be proved as it is set forth. *United States v. Britton*, 2 *Mason*, 464.

42. It seems, that if an instrument supposed to be forged, be destroyed or suppressed by the prisoner, that fact being stated in the indictment, will be a sufficient excuse for not setting forth the tenor. *Id.*

43. If an obligee tear off the seal, or cancel a bond in consequence of fraud and imposition practised by the obligor, he may declare on such mutilated bond as the deed of the party, and set forth the special facts in the profert. *U. States v. Spalding*, 2 *Mason*, 478.

44. The condition of a bond, among other things, was that the party should produce the certificates and other proofs required by law, of the landing of the merchandise at some foreign port, &c. within two years, &c.; held, that a breach negating in the terms of the condition, the production of such certificates and other proofs, was good. *Id.*

45. If a statutory offence is alleged in the indictment according to the words of the act, it is not vitiated by a conclusion, which calls the offence by a wrong name. As if the offence be *false swearing*, under the pension act of 1820, ch. 51, the indictment is not vitiated by the jurors' conclusion, "and so the jurors say, on &c. that the party did commit wilful and corrupt perjury." *U. States v. Elliott*, 3 *Mason*, 156.

46. Where the plaintiff joined counts on a bill of exchange as endorsee, with counts on bills of exchange "as beneficiary heir and administrator of the estate of J. C. P. deceased," by the law of France, and thereby proprietor of the bills, it was held, that the latter counts were in his representative character, and that there was a misjoinder. In such a case the plaintiff cannot sue on the bills of the intestate in the Circuit Court, without taking out letters of administration in Massachusetts. *Picquet v. Swan*, 3 *Mason*, 469.

47. When the declaration professes to set forth the specification in a patent, as part of the grant, the slightest variance is fatal, and the defendant is entitled to claim a nonsuit. In general, it is sufficient to state the grant in substance, in the declaration. *Tryon v. White*, 1 *Peters' C. C. R.* 96.

48. In an action of debt on an embargo bond, the declaration demanded 20,000 dollars, and recited the statute which authorizes the United States to demand a sum, not exceeding 20,000 dollars, and not less than 1000 dollars, which it averred that the defendant owed and detained. The jury found a verdict for 4000 dollars. Upon a motion to arrest the judgment, this declaration was held to be good. *U. States v. Coll.* 1 *Peters' C. C. R.* 145.

49. The declaration ought always to show title in the plaintiff, and that with sufficient certainty, and to set forth all the matters which are the essence of the action. *Gray & Osgood, v. James*, 1 *Peters' C. C. R.* 476.

50. If the plaintiff's title depends on the performance of certain acts, he must affirm the performance of those acts. *Id.*

51. No action will lie in the name of a principal, on a written contract made by his agent in his own name, although the defendant may have known the agent's character; and a demurrer, in such a case, to the declaration, where the United States were the plaintiffs, was sustained. *United States v. Parmelee*, 1 *Paine*, 252.

52. The declaration alleged an authority to draw, but not in writing, for 100,000 francs; the proof was a letter authorizing blank francs to be drawn for: Held, that this was no variance. *Rabaud v. D'Wolf*, 1 *Paine*, 580.

53. Covenant will not lie upon words in an instrument inserted by way of condition or defeasance by the performance of some collateral act. *U. States v. Brown*, 1 *Paine*, 422.

54. So upon a penal bond conditioned that one should account for public moneys, property, &c.: *Held*, that covenant would not lie upon the condition. *Id.*

55. But covenant will lie upon the bond itself; but the breach assigned must be the non-payment of the penalty. *Id.*

56. Where covenant was brought upon the bond itself, and the breach assigned was the non-performance of the condition, it was held bad on demurrer. *Id.*

57. In an action of *scire facias*, there was no declaration, but the writ of *scire facias* was demurred to: *Held*, that the legal effect was the same as if the demurrer had been to the declaration, and the same judgment was ordered to be entered. *People of Vermont v. Society for propagating the Gospel*, 1 *Paine*, 652.

58. A replication of non-payment on the day, and non-acceptance in satisfaction, is bad for duplicity. *U. States v. Gurney*, 1 *Wash. C. C. R.* 446.

PLEADING III.

Pleas.

59. A general proffert of letters testamentary, is sufficient; and if the defendant would object to their insufficiency, he must crave oyer; or, if it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement. *Childress v. Emory*, 8 *Wheat.* 642.

60. Oyer is not demandable of a record; nor, in an action upon a bond for performance of covenants in another deed, can oyer of such deed be craved; for the defendant, and not the plaintiff, must show it, with a proffert of it, or an excuse for the omission. *Sneed v. Wister*, 8 *Wheat.* 690.

61. If oyer be improperly demanded, the defect is aided on a general demurrer; but it is fatal to the plea, where it is set down as a cause of demurrer. *Id.*

62. *Nil debet* is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action. *Id.*

63. In a plea of justification by the marshal, for not levying an execution, setting forth a remission, by the Secretary of the Treasury, of the forfeiture or penalty, on which the judgment was obtained, it is not necessary to set forth the statement of facts upon which the remission was founded. *United States v. Morris*, 10 *Wheat.* 246.

64. A defective declaration may be aided by the plea, and a defective plea by the replication. *Id.*

65. Variances between the writ and declaration, are, in general, matters proper for pleas in abatement. *Chirac v. Reinicker*, 11 *Wheat.* 280.

66. Whether, by the modern practice of the Courts, variances between the writ and declaration can be taken advantage of by the defendant? *Id.*

67. Such variances cannot be taken advantage of, except upon oyer of the original writ, granted in some proper stage of the cause. *Id.*

68. Marriage of the plaintiff, *pendente lite*, does not, of itself, abate the suit. The objection can only be made available by plea in abatement. *Id.*

69. The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. *Minor v. Mechanics' Bank of Alexandria*, 1 *Peters*, 67.

70. On a joint and several bond, the plaintiff may sue all or one of the obligors. But in strictness of law, he has no right to commence a suit against any intermediate number. He must sue all or one. The objection, however, is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived by pleading to the merits. *Id.* 73.

71. A *nolle prosequi* does not amount to a *retrazit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. *Id.* 74.

72. In an action on a joint and several bond, against five defendants, four of them, being sureties, pleaded joint pleas separate from their principal, and a trial was had when the issues were had for the plaintiffs and damages assessed against the four sureties; a rule to plead was then laid on the principal obligor and co-defendant, and he did so; judgment was then entered against the sureties, and a *nolle prosequi* entered against the principal; no objection to the judgment was made in the Court below by the sureties, nor was a new trial asked by them. There is no decision exactly in point to the present case; there is no distinction between entry of a *nolle prosequi* before, and the entry after judgment, applicable to the present facts. The authorities, and particularly the American, proceed upon the ground that the question is matter of policy and convenience, rather than matter of absolute principle. *Id.* 80.

73. Where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. *Id.* 80.

74. Upon the amendment of a declaration by adding a new count, the defendant, who has pleaded to the former counts, has a right to withdraw his former plea, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he will, abide by his plea already pleaded, and waive his right of pleading *de novo*. His failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new as well as on the old counts. *Wright v. The Lessee of Hollingworth*, 1 Peters, 169.

75. A contract made by co-partners is several, as well as joint, and the *assumpsit* is made by all, and by each. It is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial. *Barry v. Foyles*, 1 Peters, 317.

76. The question of the citizenship of a party constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause. *De Wolf v. Rabaud*, 1 Peters, 498.

77. Where the Court in which judgment is rendered, has not jurisdiction over the subject matter of the suit, or where the judgment upon which suit is brought, is absolutely void, this may be pleaded in bar, or may in some cases, be given in evidence, under the general issue, in an action brought upon the judgment. *Biddle v. Wilkins*, 1 Peters, 691.

78. The general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground, that no matter of defence can be pleaded in such case, which existed anterior to the judgment. *Id.* 692.

79. The capacity of the plaintiffs to sue is admitted by pleading to the merits. If the defendant intended to take the exception, it should have been done by a plea in abatement, and the omission so to do, was a barrier of the objection. *Conard v. The Atlantic Ins. Co.* 1 Peters, 450.

80. Oyer of a bond does not include oyer of its condition, nor *e converso*. If oyer is wanted it must be prayed of each. *United States v. Sawyer*, 1 Gallis. 86.

81. If the defendant, on oyer, does not set out the whole of the bond, the plaintiff may relieve himself by praying it be enrolled. *Id.*

82. If a plea of performance be too narrow, or contain a flat negative pregnant, it is bad. *Id.*

83. The Court will go back to the first error in the pleadings, and give judgment accordingly. *Id.*

84. A plea seeking to avoid a bond for being illegally taken, *colore officii*, should specially state all the facts, which show that illegality. *Id.*

85. In an action of debt on a bond for duties, the plea admitted a certain sum to be due and unpaid, and went on to aver certain facts as to the residue of the penalty. It was held a bad plea. *United States v. Arnold*, 1 *Gallis*. 348.

86. No averment is admissible to contradict the terms of a written instrument. *United States v. Thompson*, 1 *Gallis*. 388.

87. Oyer is not demandable of the record of another Court. *Hatch v. White*, 2 *Gallis*. 153.

88. *Non cepit* in replevin puts in issue the question of general property only, and not of special property; at least in a suit between the principal and his agent. On *non cepit*, the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another. *Meany v. Head*, 1 *Mason*, 319.

89. Replevin does not lie unless there has been an unlawful taking from the possession of another. If after a bailment of goods, they are unlawfully converted or detained, detainee or trover, and not replevin, is the remedy. *Id.*

90. A general plea of *plene administravit* may be good, where all the property of the intestate has been exhausted in a regular course of administration. But if exhausted in paying debts, without notice of a debt having a legal priority, that fact should be specially pleaded. *United States v. Hoar*, 2 *Mason*, 311.

91. Replevin will not lie by one joint owner. But the objection can only be taken by a plea in abatement, where he sues for the whole. If he sues for a moiety, the Court will abate the writ *ex officio*. *D'Wolf v. Harris*, 4 *Mason*, 515.

92. That there is another part owner is not good evidence, under the plea of property in a third person. *Id.*

93. A replication to a plea of the statute of limitations, which stated that the debt arose on an account between merchant and merchant, and that the plaintiff was beyond sea, is bad for duplicity. *Craig v. Brown* 1 *Peters' C. C. R.* 443.

94. A plea, which states matters which occurred subsequent to the institution of the suit, is bad on demurrer. *Lockington v. Smith*, 1 *Peters' C. C. R.* 466.

95. A judgment had been recovered by the United States for a penalty, which was afterwards remitted. The marshal, to whom an execution was issued, had made a levy, but on being served with the warrant of remission, re-delivered the goods to the debtors. An action was thereupon brought against him in the name of the United States for the moiety of the penalty allowed to the officers; but the declaration alleged no interest in them, but only in the United States. The defendant pleaded the remission. The plaintiffs replied the interest of the officers. On special demurrer, held to be a departure. *U. States v. Morris*, 1 *Paine*, 209.

96. If a plea which purports to answer all the breaches in the declaration is a good answer to some of them only, the objection cannot be taken advantage of on error, but on special demurrer only. *U. States v. Willard*, 1 *Paine*, 539.

97. In an action on a bond, if the condition is not parcel of the obligation, as if it be a money penalty, and the former be to do some act, as to deliver goods, &c. it is not necessary for the defendant to plead *uncore prest*. *Savary v. Goe*, 3 *Wash. C. C. R.* 140.

98. In an action on a bond conditioned to deliver goods to the plaintiff or his agent at a certain time and place, a plea that the defendant was ready and willing at the time and place appointed, to deliver the goods, but the plaintiff or his agent was not then and there ready to accept, is bad on demurrer; the plea should state that the defendant was at the place appointed, in person or by an agent, ready to deliver the goods. *Id.*

99. If money is to be paid, or any other act to be done, on a certain day, and at a certain place, the legal time of performance is the last convenient hour of the day for transacting business. But if the parties meet at any part of the day, a tender and refusal at the time of the meeting are sufficient. *Id.*

POWER.

1. A power to A. Y., and his executors or administrators, to sell, may be executed by the executors of the executors of A. Y. *Daly v. James*, 8 *Wheat.* 495.

2. A power of attorney, though irrevocable on its face, or as being given as security, is revoked by the death of the party. *Hunt v. Rousmanier*, 8 *Wheat.* 174. 201.

3. But if the power be *coupled with an interest*, it survives the person giving it, and may be executed after his death. *Id.* 202. [*Et vide Hunt v. Ennis*, 2 *Mason*, 244.]

4. To constitute a power *coupled with an interest*, there must be an interest in the thing itself; and not merely in the execution of the power. *Id.* 204.

5. How far a Court of Equity will compel the specific execution of a contract, intended to be secured by an irrevocable power of attorney, which was revoked by operation of law on the death of the party. *Id.* 207.

6. A power of attorney given as collateral security for a debt is irrevocable by the grantor; but it dies with the grantee. It is not in the sense of the law a power coupled with an interest. *Hunt v. Ennis*, 2 *Mason*, 244.

7. A naked power, which expires with the death of the party creating it, is such as requires the power to be executed in the name and as the act of the grantor, and not of the grantee: as a power of attorney to execute an instrument, or to do other acts in the name of the grantor. *Id.*

PRACTICE.

- I. *General rules of practice.*
- II. *Jurisdiction.*
- III. *Process and appearance.*
- IV. *Removal of causes from the State to the Circuit Court.*
- V. *Revivor.*
- VI. *Abatement.*
- VII. *Declaration and libel.*
- VIII. *Amendments.*
- IX. *Jury, trial, and verdict.*
- X. *Deposition.*
- XI. *Damages.*
- XII. *Costs.*
- XIII. *Writ of error and appeal.* (A) *On what a writ of error may be brought.* (B) *Mode of obtaining a writ of error: Proceedings and judgment in error.* (C) *Appeal.*
- XIV. *Hearing and re-hearing.*
- XV. *Mandamus and Prohibition.*

PRACTICE I.

General rules of practice.

1. An equity suit, where an appeal has been taken from the Circuit Court to this Court, but not prosecuted, will be dismissed upon producing a certificate from the

24. The bail is fixed by the death of the principal after the return of the *ca. ss.* and before the return of the *scire facias*; and the bail is not entitled to an *exonerate* in such a case. *Davidson v. Taylor*, 12 *Wheat.* 604.

25. At common law, the release of a debtor whose person is in execution, is a release of the judgment itself. *United States v. Stansbury*, 1 *Peters*, 575.

26. A State legislature cannot suspend process in the Courts of the United States as to its citizens. *Babcock v. Weston*, 1 *Gallis*, 168.

27. A, a citizen of New Hampshire, sued a corporation established by a statute in Connecticut, in the Circuit Court of New Hampshire; the corporation having entered a general appearance, it was held, that the objection to the service under the 11th section of the judiciary act of 1789, ch. 20, was waived. *Flanders v. Æt-na Ins. Co.*, 3 *Mason*, 158.

28. An attachment is the usual process to bring a party into Court, where he has not made a true return; and if he is present in Court, no such process is necessary; but the Court may pass an order directing him immediately to answer interrogatories. *U. States v. Green*, 3 *Mason*, 482.

29. It is not a contempt of Court, to serve a person while attending at the Court as a party in a cause, or as a witness, with a summons. This privilege extends to exemption from arrest, and no further. *Blight v. Fisher*, 1 *Peters' C. C. R.* 41.

30. It is a contempt of Court to serve process, either of summons or *capias*, in the actual or constructive presence of the Court. *Id.*

31. An attorney, who enters an appearance in a suit, without authority, is answerable in damages, for the injury he may thereby have occasioned the parties. *Field v. Gibbs*, 1 *Peters' C. C. R.* 155.

32. A foreign attachment, may be laid on property in the hands of the plaintiff in the attachment. *Graighe v. Notnagle*, 1 *Peters' C. C. R.* 245.

33. Where the garnishee is plaintiff, there is no necessity for a summons, *scire facias*, interrogatories, or any coercive process against himself. *Id.*

34. Where an attachment is laid on money in the hands of a third person, interest ceases from the time of the attachment until it is dissolved; but when a debtor, who is also a creditor, lays an attachment in his own hands, interest is chargeable, during the continuance of the attachment. *Willings v. Consequa*, 1 *Peters' C. C. R.* 301.

35. *Quære*, Whether an execution for the sole benefit of an individual on a judgment of the United States, can be issued into any district of the United States as it might be if it were for their use? *U. States v. Morris*, 1 *Paine*, 209.

36. Under the act of Congress of 6th January, 1800, the sheriff of a county is bound to take a bond for the limits, as provided by the State laws, from a prisoner confined on process from the Courts of the United States, and false imprisonment would lie on his refusal. *U. States v. Noah*, 1 *Paine*, 368.

37. Such a bond has in all respects the same incidents and the like legal effect with a bond taken under the State laws. *Id.*

38. The United States are expressly named in the act, and bound by it, and an assignment of a bond to them when they are plaintiffs, is valid. *Id.*

39. The Secretary of the Treasury having accepted such an assignment, the Court presumed that he was authorized, and held the plaintiffs bound by his acceptance. *Id.*

40. The term *process*, in the act, includes executions as well as *mesne process*. *Id.*

41. After a prisoner has been enlarged upon a limit bond, the sheriff can confine him again only on the bail's becoming insufficient. He cannot accept a surrender of him—certainly not after an assignment of the bond. *Id.*

42. A *subpœna duces te cum* may issue to the President of the United States. 1 *Burr's Trial*, 183.

43. The end of an execution is to obtain satisfaction of the debt, and when delivered to the officer, it is his duty to proceed immediately for the purpose of ob-

taining satisfaction. The delivery of the execution, changes the property, and vests it in the sheriff; and his possession is notice to all the world. *Berry v. Smith*, 3 Wash. C. C. R. 68.

44. If the plaintiff orders the sheriff not to levy, the purpose of the delivery of the execution is defeated, and no change of property takes place. *Id.*

45. It is not necessary that the officer remove the property, or that he sell it before a reasonable time; but if by order of the plaintiff, the property is left with the defendant, the execution has no operation. *Id.*

46. There is no difference between a suspension of an execution for one day, or for one month or more. The order for any suspension, deprives the act of the officer of all its force, until countermanded. *Id.*

PRACTICE IV.

Removal of causes from the State to the Circuit Court.

47. The appellate jurisdiction of this Court, under the 25th section of the judiciary act of 1789, c. 20, may be exercised by a writ of error, issued by the clerk of a Circuit Court, under the seal of that Court, in the form prescribed by the act of the 8th of May, 1792, c. 137, s. 9; and the writ itself need not expressly state, that it is directed to a *final* judgment of the State Court, or that the Court is *the highest Court* of law or equity of the State. *Buel v. Van Ness*, 8 Wheat. 312.

48. The opinion of the Court, or the reasons given for its judgment, (unless in the case of instructions to the jury, spread upon the record by a bill of exceptions,) form no part of the record, within the meaning of the above 25th section. Nor are they made a part of the record by the local law of a State, requiring the judges to file their opinions in writing among the papers in the cause. *Williams v. Norris*, 12 Wheat. 117.

49. No orders in the State Court, after the removal of the record into this Court (not made by way of amendment, but introducing new matter) can be brought into the record here. The cause must be heard and determined upon the record as it stood when removed. *Id.*

50. Where there are several defendants entitled on appearance, to remove a cause from the State Court into a Circuit Court, some of whom have appeared and others not, those who have appeared cannot alone remove the cause. *Ward v. Arredondo*, 1 Paine, 410.

51. But this rule is confined to cases, where from the subject matter of the suit, the judgment or decree must be joint. *Id.*

52. Defendants can remove the cause or appear in the Circuit Court at different times, where their appearance is entered at different times in the State Court. *Id.*

53. Where some of the defendants have removed the cause regularly into a Circuit Court, the others cannot enter an original appearance in such Court. *Id.*

54. The Circuit Court can remand the cause in case the defendants do not all eventually appear. *Id.*

55. A State Court cannot cause an appearance to be entered *nunc pro tunc*, so as to entertain a motion for removal. *Id.*

PRACTICE V.

Revivor.

56. In real or personal actions, at common law, the death of parties, before judgment, abates the suit; and it requires the aid of some statutory provision, like that of the 31st section of the judiciary act of 1789, c. 20, to enable the suit to be prosecuted by, or against the personal representative or heir of the deceased, where the cause of action survives. *Green v. Watkins*, 6 Wheat. 260.

57. In writs of error upon judgments already rendered, in personal actions, if the plaintiff in error dies before assignment of errors, the writ abates at common law; but if after assignment of errors, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous, and may then revive it against the representatives of the plaintiff. *Id.*

58. But a writ of error in personal actions, does not abate by the death of the defendant in error, whether it happen before or after errors assigned; and the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to compel them. *Id.*

59. By the rules of this Court, if either party, in real or personal actions, die, pending the writ of error, his representatives in the personalty or realty, may voluntarily become parties, or may be compelled to become parties in the manner prescribed. *Id.*

60. In real actions, the death of the ancestor, without having appeared to the suit abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant. *Macker's heirs v. Thomas, 7 Wheat. 530.*

61. If the heirs be made parties by order of the Court in which the suit is brought, and judgment is entered against them by default for want of a plea, upon a summons and count against the original defendant, they may sue out a writ of error, and reverse the judgment. *Id.*

62. A *fi. fa.* issued in 1806, under which there was a levy and condemnation of the real estate of the defendant, and afterwards a *venditioni* was taken out. The levy, inquisition, and *venditioni* were quashed. Afterwards the defendant died. In 1813, a *fi. fa.* was issued, and a levy made on several lots in the hands of persons, purchasers thereof since the judgment. This execution was quashed on the ground that the judgment ought to have been revived, against the defendant's executors, in order to make it the foundation of this process; although it might have been different, had an *alias fi. fa.* been taken out, and continuances entered. *Wilson v. Hurst, 1 Peters' C. C. R. 140.*

63. To a *scire facias* against an executor, to revive a judgment obtained against his testator, the defendant cannot plead that there are terre tenants whose lands are also bound by the judgment, so as to oblige the plaintiff to sue out a *scire facias* against them. The proper remedy, for persons aggrieved by proceedings under such a judgment, is an *audita querela*, or by obtaining a rule of Court, to stay proceedings. *Wilson v. Watson, 1 Peters' C. C. R. 269.*

PRACTICE VI.

Abatement.

64. The defendant cannot plead a foreign attachment, levied by him in his own hands, in bar to an action against him, by the defendant in the attachment, so as to set off damages against the plaintiff; he must plead the attachment in abatement. If judgment be obtained in the attachment levied in his hands, he may offset the amount. *Cheongwo v. Jones, 3 Wash. C. C. R. 359.*

PRACTICE VII.

Declaration and libel.

65. The strictness of technical common law forms is not indispensable in proceedings *in rem* in the Admiralty. In general, in a libel for a forfeiture, it is sufficient to allege the offence in the words of the statute. *The Palmyra, 12 Wheat. 1.*

66. Informations *in rem* are not criminal proceedings. *Anon. 1 Gallis. 24.*

67. If an informer in his libel, blend his rights with those of the United States, in the manner of a *qui tam* action, it is at most but an irregularity, not affecting the

nature of the proceedings. If the informer cannot take any interest, condemnation will pass to the United States. *The Emulous*, 1 *Gallis*, 563.

68. A libel for a statute forfeiture should substantially agree with the terms of the statute; otherwise, it is bad. *The Betsey*, 1 *Mason*, 354.

69. In a libel for wages, the allegations of the hiring, voyage, &c. should be drawn accurately and with reasonable certainty; otherwise, it may be excepted to. The most correct course is, to state the facts, &c. in distinct articles, which is the usual course in admiralty proceedings. No facts of misbehaviour, or other cause of forfeiture of wages, are admissible at the hearing, unless the answer distinctly propounds them, and puts them in issue. *Orne v. Townsend*, 4 *Mason*, 541.

70. A libel should state the particular facts intended to be relied on, or they will not be considered at issue. *The Isabella*, 1 *Paine*, 2.

PRACTICE VIII.

Amendments.

71. In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted, in the discretion of the Court. *Walden v. Craig*, 9 *Wheat*, 576.

72. But a writ of error will not lie, in a case where the Court below has denied a motion for this purpose. *Id.*

73. Amendments to the proceedings are matters in the discretion of the Court below. Error will not lie to this Court on the allowance or refusal of such amendments. *Chirac v. Reticker*, 11 *Wheat*, 280. *Wright v. Hollingsworth*, 1 *Peters*, 168.

74. The Circuit Court may grant amendments in proceedings *in rem*, brought by appeal from the District Court. *Anon.* 1 *Gallis*, 22.

75. The Circuit Courts, on appeal from the Districts Courts, have power by the 32d section of the judiciary act, to allow any amendments of defects in form occurring in the Court below, which could have been amended there, or to disregard them in giving judgment. *Smith v. Jackson*, 1 *Paine*, 486.

76. But this power does not extend to defects in substance. *Id.*

77. Such defects may however be amended in the District Court, on terms. This power is more extensive than any given to the English Courts. *Id.*

78. But the amendments must be made before final judgment. *Id.*

79. An omission of the averment of citizenship is a defect in substance, not cured by verdict, and which cannot be amended after judgment. *Id.*

80. So of the averment of the value of the property in dispute when necessary to give jurisdiction. *Id.*

81. Amendments at common law were for trivial errors, and where there was something to amend by. Anciently, they could be made only during the term when the error occurred in the record; afterwards they were allowed at any time pending the suit; but never after final judgment. *Id.*

82. By the provisions of the act of Congress, a variance which is mere matter of form, may be amended at any time. *Scull v. Biddle*, 2 *Wash. C. C. R.*, 200.

PRACTICE IX.

Jury, trial, and verdict.

83. The discharge of the jury from giving a verdict in a capital case, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offence. *United States v. Perez*, 9 *Wheat*, 579.

84. The Court is invested with the discretionary authority of discharging the jury from giving any verdict, in cases of this nature, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated. *Id.*

85. It is not necessary that a bill of exceptions should be formally drawn and signed before the trial is at an end. The exception may be taken at the trial, and noted by the Court, and may, afterwards, during the term, be reduced to form, and signed by the Judge. But in such cases, it is signed *nunc pro tunc*, and purports, on its face, to be the same as if actually reduced to form, and signed during the trial. It would be a fatal error if it were to appear otherwise. *Walton v. United States*, 9 *Wheat.* 651.

86. Although the Judge may refuse to declare the law to the jury on a mere hypothetical question propounded by the counsel, and not warranted by the evidence in the cause, yet, if he proceeds to state the law upon such question, and states it erroneously, his opinion may be revised in the Court above; and if it be such as may have had an influence on the jury, their verdict will be set aside. *Etting v. Bank of the United States*, 11 *Wheat.* 59.

87. Where the Court is equally divided in opinion upon a writ of error, the judgment of the Court below is to be affirmed. *Id.*

88. The practice of bringing the whole *evidence*, instead of the *facts* proved by the evidence, for review, before this Court, by bill of exceptions or otherwise, is, to say the least, extremely inconvenient. The party cannot, by such a practice, take advantage of any omission in the Judge's charge, under a general exception to it. If he wishes the instruction of the Court to the jury on one point omitted in the charge, he must suggest it, and request the Judge's opinion on it. *Armstrong v. Toler*, 11 *Wheat.* 258.

89. In examining the admissibility of testimony in the Court above, the party excepting is to be confined to the specific objection taken at the trial. *Hinde v. Longworth*, 11 *Wheat.* 199.

90. Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this Court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the Court below, with directions to render a *venire facias de novo*. *Barnes v. Williams*, 11 *Wheat.* 415.

91. Where the burthen of proof of certain specific defences set up by the defendant is on him, and the evidence presents contested facts, an absolute direction from the Court that the matters produced and read in evidence on the part of the defendant were sufficient in law to maintain the issue on his part, and that the jury ought to render their verdict in favour of the defendant, is erroneous; and a judgment rendered upon a verdict purporting to have been given under such a charge will be reversed, although the record was made up as upon a bill of exceptions taken at a trial before the jury upon the matters in issue, no such trial ever having taken place, and the case having assumed that shape by the agreement of the parties, in order to take the opinion of the Court upon certain questions of law. *United States v. Tillotson*, 12 *Wheat.* 180.

92. Objections to the form and sufficiency of the indictment, may, in the discretion of the Court, be discussed and decided during the trial before the jury; but generally speaking, they ought regularly to be considered only upon a motion to quash the indictment, or in arrest of judgment, or on demurrer. *United States v. Gooding*, 12 *Wheat.* 460.

93. Where two or more persons are jointly charged in the same indictment with a capital offence, they have not a *right*, by law, to be tried separately, without the consent of the prosecutor; but such separate trial is a matter to be allowed in the discretion of the Court. *United States v. Merchant*, 12 *Wheat.* 480.

94. No judgment can be rendered upon a demurrer to evidence until there is a joinder in demurrer; and issue cannot be joined upon the demurrer so long as there is any matter of fact in controversy between the parties. *Fowle v. The Common Council of Alexandria*, 11 *Wheat.* 320.

95. The demurrer to evidence must state facts, and not merely the evidence conducing to prove them. *Id.*

96. One party cannot insist upon the other party joining in demurrer, without distinctly admitting, upon the record, every fact, and every conclusion, which the evidence given for his adversary conduced to prove. *Id.*

97. Where the demurrer to evidence is defective in these respects, and judgment has, notwithstanding, been rendered upon it for the party demurring, by the Court below, the judgment will be reversed in this Court, and a new trial awarded. *Id.*

98. On a demurrer to evidence, the judgment of the Court stands in the place of the verdict of the jury; and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error. *U. S. Bank v. Smith*, 11 *Wheat.* 171.

99. On a demurrer to evidence, the Court is substituted in the place of the jury as judges of the facts, and every thing which the jury might reasonably infer from the evidence, is to be considered as admitted. *Id.*

100. The practice of demurring to evidence is to be discouraged, and Courts will be extremely liberal in their inferences where the party takes the question of fact from the appropriate tribunal. *Id.*

101. The Circuit Court has no authority to order a peremptory nonsuit against the will of the plaintiff. *Elmore v. Grymes*, 1 *Peters* 471. *D'Wolf v. Rabaud*, *Id.* 497.

102. A special verdict was found by the jury, subject to the opinion of the Court on the construction of a deed which was referred to but not contained in the verdict. A deed formed a part of a bill of exceptions taken to the opinion of the Court, on a motion subsequently made for a new trial. The Court cannot know, judicially, that this is the same deed which is referred to in the verdict, or what are the other evidences of title which are connected with it. *M'Arthur v. Porter's Lessee*, 1 *Peters*, 626.

103. A direction to the jury, "that the several matters so produced and proved were sufficient to prove the issue aforesaid, on the part of the plaintiffs," was held not to be an interference by the Court with the province of the jury. *Mason v. United States*, 1 *Gallis*, 53.

104. So too, "that W. ought by law to be considered as the said A.'s agent, in all concerns respecting the said vessel and cargo," ought to be viewed as declaring the legal operation of acts, which either were not questioned, or were left to the jury to determine. *Id.*

105. If before the verdict he agreed on, one of the jury separate from his fellows by mistake, and afterwards rejoin them, and the verdict is then found; it is in the discretion of the Court to allow the verdict to stand. *Burrill v. Phillips*, 1 *Gallis*, 360.

106. It is no ground of a bill of exceptions that a Court refused to instruct the jury on a point of law, which was so stated that it involved an opinion on matters of fact, as where an opinion was prayed "under the circumstances of the case," which were not found as facts. *United States v. Burnham*, 1 *Mason*, 57.

107. A verdict which is repugnant or uncertain in a material point is void. *Stearns v. Barrett*, 1 *Mason*, 153.

108. The refusal of a Court to amend the verdict is not matter, which can be assigned for error. *Id.*

109. Although the law of the State requiring the Supreme Court to decide on a bill of exceptions, before a writ of error is brought, does not govern the practice of this Court, yet a bill of exceptions was received as a substitute for a case on a motion for a new trial. *Brewster v. Gelston*, 1 *Paine*, 426.

110. The Court will leave the question of fact to the jury; yet they will exercise a discretion; and if they think the verdict was against evidence, they will grant a new trial. *Kohne v. Ins. Co. of N. America*, 1 *Wash. C. C. R.* 123.

111. Although the omission of the Court to charge the jury, on important questions of law, involved in the case, is not in itself a reason for granting a new trial; yet the Court will exercise a discretion; and, if they think the justice of the case

will be promoted, they will grant it. *Calbreath v. Gracy*, 1 Wash. C. C. R. 198.

112. Where evidence is permitted to go to the jury without objection, it is too late to object when the plaintiff's counsel has finished his opening; nor will a new trial be awarded in such case. *Russel v. Union Insurance Co.*, 1 Wash. C. C. R. 440.

113. A new trial was awarded, where new and material evidence had been discovered, which the Court deemed so important, that it ought to be submitted to a jury. *Marshall v. Union Ins. Co.*, 2 Wash. C. C. R. 44.

114. A new trial was refused, because the defendant would, in the event of the same being granted, compel the plaintiff to submit to a nonsuit in consequence of a defect in his declaration, and thus defeat the justice of the case. *Gerbier v. Emery*, 2 Wash. C. C. R. 413.

115. A motion for a new trial does not suspend the entering of judgment after one verdict; but execution will be stayed on application to the Court. *Arnold v. Jones, Bee*, 104.

PRACTICE X.

Deposition.

116. The authority to take depositions of witnesses under the act of Congress of 4th September, 1789, ch. 20, being in derogation of the rules of the common law, has always been construed strictly; and therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. *Bell v. Morrison*, 1 Peters, 355.

117. The certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed. *Id.* 356.

118. No objection can be made in the Supreme Court of the United States to a deposition as taken irregularly, unless the objection is taken in the Court below and entered of record. *Mechanics' Bank of Alexandria v. Seton*, 1 Peters, 299.

119. A special commission was, under the circumstances of the case, allowed, to Great Britain, to take the deposition of a witness, with instructions, 1. That the interrogatories should be filed in the Court here by both parties, previous to the issuing of the commission. 2. That the commissioners should be directed not to admit any additional interrogatories. 3. That neither parties nor counsel should be permitted to appear before the commissioners. *Cunningham v. Otis*, 1 Gallis. 166.

120. When there is an attorney of record, it is improper to take depositions without notice to him or to the party. *The Argo*, 2 Gallis. 314.

121. When depositions are taken to be used against the United States, if there be an attorney of the United States within one hundred miles of the place of caption, he must be notified. *Id.* 314.

122. If the cross interrogatories are not put to a witness, examined under a commission, the deposition of the witness cannot be read. *Gilpins v. Consequa*, 1 Peters' C. C. R. 86. S. C. 3 Wash. C. C. R. 185.

123. It is no objection to a deposition, that it is in English, and commissioners before whom it was taken were Dutchmen, and do not state that they had the assistance of a sworn interpreter. *Id.*

124. Nor is it an objection, that the cross interrogatories were not put to each witness, immediately after he had answered the chief interrogatories, but were put to him after all the chief interrogatories were answered by all the witnesses. *Id.*

125. Nor is the commission defective, because the commissioners and their clerk were not sworn. *Id.*

126. The commissioners are appointed by the Court, and although they may be nominated by the parties, they are not their agents. *Id.*

127. The Circuit Court will issue *letters rogatory*, for the purpose of obtaining testimony, when the government of the place where the evidence is to be obtained, will not permit a commission to be executed. *Nelson v. U. States*, 1 *Peters' C. C. R.* 235.

128. If it appear on the face of a deposition taken under the act of Congress, that the officer taking the same was authorized by the act, it is sufficient in the first instance, without any proof that he was such officer. *Ruggles v. Bucknor*, 1 *Paine*, 358.

129. Objections to the competency of the witness should be made at the time of taking a deposition under the 30th section of the judiciary act, if the party attend, and the objections are known to him, in order that they may be removed. Otherwise he will be presumed to have intended to waive them. *U. States v. One Cass Hair Pencils*, 1 *Paine*, 400.

130. But the objection may be made at the time of reading the deposition, if the facts constituting the objection were not known to the party when it was taken. *Id.*

131. Depositions upon *de bene esse*, cannot be read in evidence, unless the party who offers them, shows that the witnesses were subpoenaed, and cannot attend. *Penns v. Ingraham*, 2 *Wash. C. C. R.* 487.

132. A commission was set aside, because, in consequence of a misdirection of it by the commissioners, it had been opened by an officer of the government before it came into the hands of the clerk; and a new commission ordered, to which the original papers attached to the old one were to be annexed. *U. States v. Price*, 2 *Wash. C. C. R.* 356.

133. A joint commission to take a deposition must be executed by all the commissioners, although the commissioner named by the party against whom the witness is offered, after proceeding some length in the examination, withdrew, and refused to complete it. *Munns v. Dupont*, 3 *Wash. C. C. R.* 31.

134. If the general interrogatory is not answered, by a witness examined under a commission, it is fatal to the deposition. A witness cannot be asked, if the facts stated in an *ex parte* certificate are true; he should be interrogated as to those facts particularly. *Richardson v. Golden*, 3 *Wash. C. C. R.* 109.

135. A commission directed to A and B, or either of them, authorizes the deposition of A to be taken by B. *Lonsdale v. Brown*, 3 *Wash. C. C. R.* 404.

136. A deposition of a witness residing in this State, above one hundred miles from the place of holding the Court, taken under a rule entered by the plaintiff in the clerk's office, but not in conformity with the requisitions of the 30th section of the judicial act, cannot be read in evidence. *Evans v. Hettick*, 3 *Wash. C. C. R.* 409.

137. The deposition of a witness, living out of the state, and more than one hundred miles from the place where the Court is held, cannot be read, unless taken under a commission. *Bleecker v. Bond*, 3 *Wash. C. C. R.* 529.

PRACTICE XI.

Damages.

138. In debt, a less sum may be recovered than that demanded in the writ, where an entire sum is demanded, and it is shown by the counts to consist of several distinct debts, or where the precise sum demanded is diminished by extrinsic circumstances. *Hughs v. Union Ins. Co.*, 9 *Wheat.* 294.

139. Where the declaration purport d to count upon sixty-eight bills of the Bank of the Commonwealth of Kentucky, and it appeared that one of the bills had been omitted to be described, so that the declaration made out a less sum than the writ

claimed or the judgment gave, the Court allowed the defendants in error, to cure the defect by entering a *remittitur* of the amount of the bill so omitted and damages *pro tanto*; but on payment of the costs of the writ, if error should be prosecuted no further after such amendment made. *The Bank of Kentucky v. Ashley*, 2 *Peters*, 327.

140. Where a statute gives the party double or treble damages, the jury may find the single damages, and the court will double or treble them. And a general verdict will be deemed for *single* damages, unless the contrary appears. But a verdict for the double or treble damages will be good, if expressly so found. *Cross v. U. States*, 1 *Gallis*. 26.

141. It is generally, in the discretion of the jury, to give interest in the name of damages; although it is not agreeable to legal principles, to allow it on unliquidated and contested claims. *Gilpins v. Consequa*, 1 *Peters' C. C. R.* 86. *Willings v. Consequa*, 1 *Peters' C. C. R.* 172.

PRACTICE XII.

Costs.

142. Where the writ of error is dismissed for want of jurisdiction, no costs are allowed. *M'Iver v. Wattles*, 9 *Wheat*. 650.

143. No judgment or decree can be rendered directly against the United States for costs and expenses. *The Antelope*, 12 *Wheat*. 546.

144. Where several claims had been filed, and before any further proceedings, Congress remitted the forfeitures upon the payment of duties, costs, and charges; held, that the district attorney was entitled to \$17 on each claim. *The Francis*, 1 *Gallis*. 453.

145. For such costs as the plaintiff is liable, the Court will grant an attachment in favour of the officers of the Court. *Bowne's Lessee v. Arbuckle*, 1 *Peters' C. C. R.* 233.

146. If the Court had jurisdiction of the cause, when the action was commenced, the repeal of the law which gave the jurisdiction, will not take away the plaintiff's right to costs. *Walker v. Smith*, 1 *Wash. C. C. R.* 202.

PRACTICE XIII.

Writ of error and appeal. (A) *On what a writ of error may be brought.*

(B) *Mode of obtaining a writ of error: proceedings and judgment in error.* (C) *Appeal.*

(A) *On what a writ of error may be brought.*

147. A writ of error lies from this Court, upon a judgment of the Circuit Courts, awarding a peremptory mandamus. *The Columbian Insurance Company v. Wheelwright*, 7 *Wheat*. 534.

148. Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of reversal for error, in an appellate Court, that such authority does not appear on the face of the record. It is a formal defect, which is cured by the statute of jeofails, and the 32d section of the judiciary act of 1789, ch. 20. *Osborn v. Bank of the U. States*, 9 *Wheat*. 738.

149. It is no ground of reversal, that the Court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. *Pennock & Sellers v. Dialogue*, 2 *Peters*. 1.

150. A writ of error is the proper process to correct the errors of the District Court in common law actions. *United States v. Wonson*, 1 *Gallis*. 5.

151. It is error for the Court to declare a question of law to be a question of fact. *United States v. Carlton*, 1 *Gallis*. 400.

152. Although an error appear on the record, yet if in distinct pleadings, a complete bar is shown to the action, the judgment must be affirmed. *Id.*

153. The issue of *nul tiel record* is an issue of fact, and as such no writ of error lies from the judgment of the District Court on that fact to the Circuit Court under the judiciary act of 24th Sept. 1789, ch. 20, sec. 22. *United States v. Cook*, 2 *Mason* 22.

154. Where the issue in the District Court is *nul tiel record*, and the Court below adjudge that the plaintiff has not produced the record, there can be no reversal of that judgment, unless the record, if any is produced, is contained in the record brought up on the writ of error to the Circuit Court. *Id.*

(B) *Mode of obtaining a writ of error : proceedings and judgment in error.*

155. A *certiorari*, upon a suggestion of diminution in the record, may be made by the clerk, and need not be made by the judge of the Court below. *Stewart v. Ingle*, 9 *Wheat.* 526.

156. Under the judiciary act of 1789, ch. 20, s. 22, the security to be taken from the plaintiff in error, by the judge signing a citation on a writ of error, must be sufficient to secure the whole amount of the judgment, and is not to be confined to such damages as the appellate Court may adjudge for the delay. *Callett v. Brodie*, 9 *Wheat.* 553.

157. Where there is a joint judgment against several defendants, and one only sues out the writ of error without joining the others, it is irregular ; but if the others refuse to join in it, *quære*, whether the plaintiff may not have summons and severance ? *Williams v. Bank of the U. S.* 11 *Wheat.* 414.

158. Upon a writ of error, if the verdict below was given upon an immaterial issue, a repleader cannot be awarded ; but judgment must be rendered against the party who committed the first fault, if there be sufficient matter on which to found such judgment. *United States v. Burnham*, 1 *Mason*, 57.

(C) *Appeal.*

159. A decree of the highest Court of Equity of a State, affirming the decretal order of an Inferior Court of Equity of the same State, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the 25th section of the judiciary act of 1789, c. 20, from which an appeal lies to this Court. *Gibbons v. Ogden*, 6 *Wheat.* 449.

160. In cases brought to this Court by appeal from the highest State Court under the 25th sec. of the judiciary act of 1789, c. 20, this Court is confined to an examination of the right, title, claim, or exemption, set up by the party as depending upon the construction of the law or treaty, &c. of the United States, under which it is set up. *Matthews v. Zane*, 7 *Wheat.* 206.

161. On the appellate jurisdiction of this Court in cases arising in the State Courts under the constitution, laws, and treaties of the United States. *Id. note a.*

162. An appeal under the judiciary acts of 1789, c. 20, s. 22, and of 1803, c. 353, [xciii.] prayed for, and allowed within five years, is valid, although the security was not given until after the lapse of five years. *The Dos Hermanos*, 10 *Wheat.* 806.

163. The mode of taking the security, and the time for perfecting it, are within the discretion of the Court below, and this Court will not interfere with the exercise of that discretion. *Id.*

164. On a libel in *personam* for damages, if the Court decrees that damages be recovered, and that commissioners be appointed to ascertain the amount thereof, no appeal will lie from such a decree until the commissioners have made their report ; this not being a final decree. *Chace v. Vasquez*, 11 *Wheat.* 429.

165. Where the appellee had died after the commencement of the term, and the Court not knowing his decease, had decided upon the case, after argument, the Court ordered the decree to be entered as of the first day of the term. *Bank of U. S. v. Weisiger*, 2 *Peters*. 481.

166. The Court refused to revive the decree of the Circuit Court of the county of Washington, although an error had been committed in proceeding under the mandate from this Court ; as no benefit would result to the appellant from a reversal. *Campbell's executors v. Pratt*, 2 *Peters*. 354.

PRACTICE XIV.

Hearing and re-hearing.

167. This Court will not grant re-hearing in an equity cause, after it has been remitted to the Court below to carry into effect the decree of this Court, according to its mandate. *Browder v. M^r Arthur*, 7 *Wheat*. 60.

PRACTICE XV.

Mandamus and prohibition.

168. The Court refused a *mandamus* to the Circuit Court for the county of Washington, commanding them to strike off a plea which the Court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiff's counsel deemed the proper plea, under the provisions of an act of the legislature of Maryland, upon which the proceedings were founded. *Bank of Columbia v. Sweeny*, 1 *Peters*, 567.

169. The Circuit Courts have no power to issue writs of *mandamus*, after the practice of the King's Bench, but only where they are necessary for the exercise of their jurisdiction. *Smith v. Jackson*, 1 *Paine*, 453.

170. But where a District Court refuses to give judgment, a *mandamus* lies to compel it. *Id.*

171. But a *mandamus* will not lie to a District Court, to compel it to expunge amendments improperly made in the record returned to the Circuit Court on a writ of error. *Id.*

PRIZE.

- I. *Jurisdiction of the Prize Court.*
- II. *Authority to capture, and exemption from capture.*
- III. *Questions of proprietary interest, and freight.*
- IV. *Domicil and national character.*
- V. *Liability to capture for navigating under the enemy's license.*
- VI. *Contraband, blockade, and resistance of visitation and search.*
- VII. *Trade with the enemy, and breach of municipal law.*
- VIII. *Ransoms, recapture, and salvage.*
- IX. *Treaty of peace.*
- X. *Practice of the Prize Court.*

PRIZE I.

Jurisdiction of the Prize Court.

1. *Quære*, How far a condemnation as prize in the Court of the captor's country will oust the jurisdiction of a neutral tribunal, proceeding *in rem* against the captured property for a violation of the neutral jurisdiction? *The Santissima Trinidad*, 7 *Wheat*. 355.

2. Such a condemnation will not oust the jurisdiction of the neutral tribunal, which has custody of the *res capta*, before its condemnation in the Court of the captor. *Id.*

3. Captors have a right to carry their prizes to a proper and convenient port for adjudication, and are not controllable by the revenue officers. *The Lively*, 1 *Gallis*. 315.

4. The Courts of the United States have jurisdiction over all prizes made in ports, as well as on the high seas, by virtue of the delegation of Admiralty and maritime jurisdiction. *The Cargo of the Emulous*, 1 *Gallis*. 563.

5. The Prize Court has jurisdiction to decree restitution of a vessel recaptured from the enemy, and to award damages against the recaptors for embezzlement. *The Dove*, 1 *Gallis*. 585.

6. A Court of Prize will take cognizance, not only of all questions of prize, but of every incident thereto, until a final adjustment of all claims arising from the capture. *The St. Lawrence*, 2 *Gallis*. 19.

7. It will, therefore, entertain a supplemental suit for the distribution of prize proceeds. *Id.*

8. If the prize proceeds remain in the Circuit Court, application for distribution may be originally made there. If they have been paid over, and the cause is no longer pending, the District Court is the proper jurisdiction. *Id.*

9. The prize act of 27th January, 1813, chap. 155, authorizing the marshal to make distribution, does not narrow this jurisdiction. He still acts subject to the control of the Prize Court. *Id.*

10. That act does not apply to sales made under interlocutory decrees, but only to sales after final condemnation. *Id.*

11. If in a prize cause, the claimant appeal and desert his appeal, the Circuit Court may affirm the decree of the District Court with costs. *The Betsey*, 1 *Gallis*. 416.

12. On an appeal to the Circuit Court, the property follows the appeal into that Court, and is no longer subject to the interlocutory orders of the District Court. It is otherwise with regard to the Supreme Court, whose decrees are remanded to

the Circuit Court for execution, and therefore the property always remains in the custody of the latter. *The Grotius*, 1 *Gallis*. 503.

13. The District Court has no authority, after an appeal, to bail or sell the property. *Id.*

14. The trial of prizes belongs exclusively to the Courts of the country of the captors. Neutral nations may interfere so far only as to ascertain, whether prizes brought into their ports have been captured by a lawfully commissioned vessel, and whether the neutral sovereignty has been violated by the capture. And it makes no difference, whether the captured property belong to an enemy or to the neutral. *The Invincible*, 2 *Gallis*. 29. *S. P. Maissonnaire v. Keating*, 2 *Gallis*. 340.

15. No suit can be sustained in a neutral tribunal against a lawfully commissioned cruiser, which is brought within its jurisdiction, to recover damages for a supposed illegal capture. *The Invincible*, 2 *Gallis*. 29.

16. It is the duty of the captors to bring in the prize crew, or at least the master and principal officers, with the prize, for adjudication. An omission to do this must be fully and satisfactorily explained to the Court, otherwise it will withhold condemnation. *Id.* *The Arabella and Madeira*, 2 *Gallis*. 368. *The Flying Fish*, 2 *Gallis*. 374.

17. A Court of Common Law cannot, even incidentally, decide a question of prize. *Maissonnaire v. Keating*, 2 *Gallis*. 325.

18. The Prize Courts of a belligerent may take jurisdiction of property captured by its cruisers, while such property is lying in a foreign port. *The Arabella and Madeira*, 2 *Gallis*. 368.

19. The tribunals of one sovereign cannot revise acts done under the authority of another. *The Invincible*, 2 *Gallis*. 44.

20. Where a condemnation is by a foreign Court, it will be presumed to be a legal one, if the constitution of it be not known. *Snell v. Faussatt*, 1 *Wash. C. C. R.* 271.

21. Where its constitution is known, it is proper for the Court to examine into it; and, if it has been constituted by a different authority, from what is usual in civilized nations, it becomes him, who would support its jurisdiction, to prove it was erected by proper authority. *Id.*

22. The erection of Courts, is, in all civilized nations, the act of the sovereign; although he may delegate the authority to subordinate agents. *Id.*

23. It is unusual for a military commander to exercise the right to erect Courts; and nothing will be presumed in favour of tribunals so established. *Id.*

24. Prize jurisdiction is involved in the general delegation of Admiralty and maritime powers. *Jennings v. Carson's Ex.*, 1 *Peters' Adm. Decis.* 1.

25. The District Court has no power to inquire into the legality of a prize made by and from a belligerent. *Findlay v. The William*, 1 *Peters' Adm. Dec.* 12. *Moxon v. The Fanny*, 2 *Peters' Adm. Dec.* 309.

26. Thus where a British vessel was captured by a French privateer, within the territorial jurisdiction of the United States, a libel filed against her by her former owners was dismissed for want of jurisdiction. *Id.*

27. Courts for trial of prizes made by belligerents cannot legally be erected in a neutral country. *Findlay v. The William*, 1 *Peters' Adm. Dec.* 12.

28. Where a British vessel was captured by a French privateer, within the territorial jurisdiction of the United States, a libel filed against her by her former owners was dismissed by the Court for want of jurisdiction. *Id.* *Moxon v. The Fanny*, 2 *Peters' Adm. Decis.* 309.

29. But where an American vessel which had been chartered to neutrals, was taken by a French privateer while on a lawful voyage, and brought into the port of Philadelphia, the District Court took cognizance of the case, and ordered her to be restored, and awarded damages to the owners of the ship and cargo. *Hollingsworth v. The Betsey*, 2 *Peters' Adm. Decis.* 330.

30. And where an American vessel was captured by a French privateer and condemned by a Court held on board a French vessel at sea, and having been pur-

chased by the respondent, was brought into the port of Philadelphia, the District Court ordered her to be restored to her former owners. *Jolly v. The Neptune*, 2 *Peters' Adm. Decis.* 345.

31. The jurisdiction of the Court is ousted in case of capture on the high seas, by a privateer lawfully commissioned, of the property of an enemy to the sovereign issuing the commission. The case is not altered though the capture should have been originally made by a *proscribed* privateer. *Castello v. Bouteille*, *Bee*, 29.

32. A French armed ship duly commissioned, but fitted out here, may, under the treaty with France, and the 6th section of the act of 5th June, 1794, bring in and carry away her prizes without being subject to the jurisdiction of the Court. *Stannick v. The Friendship*, *Bee*, 40.

33. The Courts of the United States cannot question the validity of the commission of a French privateer, whose prize is brought into our ports by virtue of the 17th article of the treaty with France. *Ramon v. Nostra Signora del Camino*, *Bee*, 43.

34. Restitution of a vessel and cargo illegally seized by a French privateer and carried into a French port, was decreed to the admiralty there; and this Court sustained a suit for consequential damages. *M'Grath v. The Candaleiro*, *Bee* 60.

35. A privateer was illegally fitted out here, and commissioned by Genet. As such she was among those proscribed by the president of the United States, and was dismantled in North Carolina, and sold. She was afterwards fitted out for war in a French port, and by a French commission. This is no breach of neutrality. *Williamson v. The Betsy*, *Bee*, 67.

36. The 17th article of the treaty with France protects French privateers in bringing their prizes into our ports, (though such privateers may have originally been American bottoms,) if the equipment for war be in a French port, and the commission regularly obtained by French citizens. *British Consul v. The Mermaid*, *Bee* 69.

37. Letters of marque differ in their national character from national ships of war, or privateers, inasmuch as they are employed for commercial purposes, and are only allowed to cruise occasionally. Seamen on board of letters of marque may sue for their wages in a neutral port. *Ellison v. The Bellona*, *Bee*, 112.

38. Condemnation in a French Court of Admiralty of property carried into the ports of an ally, cannot be inquired into by the Courts of this country. *Sheaff v. The Betsey*, *Bee*, 163.

39. Property captured by a French privateer, sold in a Spanish port before condemnation, and brought by the purchasers to this place, will be restored by this Court, upon suit brought by an agent of the first owners; the property being sufficiently identified, and the original owners being citizens of the United States. *Roe v. Himili*, *Bee*, 300.

40. A sentence of condemnation, founded on a municipal regulation, which was not made till after the capture, shall not avail to prevent restitution if the property be brought within the jurisdiction of the Courts of this country, of which those owners are citizens. *Id.* 308.

PRIZE II.

Authority to capture, and exemption from capture.

41. Whether the capture is made by a duly commissioned captor, or not, is a question between the government and the captor, with which the claimant has nothing to do. *Amiable Isabella*, 6 *Wheat.* 66.

42. If the capture be made by a non-commissioned captor, the government may contest the right of the captor after a decree of condemnation, and before a distribution of the prize proceeds; and the condemnation must be to the government *Id.*

43. The 17th article of the Spanish treaty of 1795, so far as it purports to give any effect to passports, is imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty. *Id.* 69.

44. A citizen of the United States cannot claim, in their Courts, the property of foreign nations in amity with the United States, captured by him in war, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned. *The Bello Corrunes*, 6 *Wheat.* 152.

45. In case of an illegal capture, in violation of the neutrality of this country, the property of the lawful owners cannot be forfeited for a breach of its revenue laws, by the captors, or persons who have rescued the property from their possession. *Id.*

46. An augmentation of force or illegal outfit within the neutral territory only affects captures made during the cruise for which such augmentation or outfit was made. *Id.*

47. Captures by public ships, as well as by privateers, if made in violation of our neutrality, are subject to restitution. *Id.*

48. Prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States will be restored if brought into our ports. *The Gran Para*, 7 *Wheat.* 471.

49. But this Court has never decided that the offence adheres to the vessel under whatever change of circumstances that may take place, nor that it cannot be deposited at the termination of the cruise, in preparing for which it was committed; but if this termination be merely colourable, and the vessel was originally equipped with the intention of being employed on the cruise, during which the capture was made, the *delictum* is not purged. *Id.*

50. Case of capture by an armed vessel, fitted out in the ports of the United States, in breach of the neutrality acts. Claim by an alleged *bonæ fidei* purchaser in a foreign port rejected, and restitution decreed to the original owners. *The Fanny*, 9 *Wheat.* 658.

51. A *bonæ fidei* purchaser, without notice, in such case, is entitled to be reimbursed the freight which he may have paid upon the captured goods and the innocent neutral carrier of such goods, the same having been transhipped in a foreign port, is entitled to freight out of the goods. *Id.*

52. Seizures made, *jure belli*, by non-commissioned captors, are made for the government, and no title of prize can be derived but from the prize acts. *The Dos Hermanos*, 10 *Wheat.* 306. *The Joseph*, 1 *Gallis.* 545.

53. If there be an *animus capiendi*, and a submission on one side, and a possession on the other, it constitutes a capture, although no prize crew be put on board. *The Alexander*, 1 *Gallis.* 532.

54. A prize crew is not necessary to navigate a captured ship, so as to preserve the possession of the captors, if the captured crew agree to navigate her. *Id.*

55. The President's instruction of 28th of August, 1812, did not protect from capture vessels coming from British ports with cargoes put on board long after a full knowledge of the war. *Id.* S. P. *The Joseph*, 1 *Gallis.* 545.

56. A capture may well be made by a privateer of the United States, within three miles of the shores of the United States. *The Joseph*, 1 *Gallis.* 545.

57. A cargo belonging to enemies, and found in our ports at the breaking out of a war, is confiscable *jure belli* without any special act of Congress authorizing the seizure. *The Cargo of the Emulous*, 1 *Gallis.* 563.

58. All property captured in time of war belongs to the government, unless granted by them to other persons. *Id.*

59. By the law of nations the debts, credits, and corporeal property of an enemy, found in the country on the breaking out of war, are confiscable. *Id.*

60. Upon a declaration of war, the President has authority as incident to his office, to employ all the usual and customary means, acknowledged by the law of nations, to carry it into effect. *Id.*

61. He may therefore lawfully authorize the capture of enemy property wherever by the law of nations it is liable to capture. *Id.*

62. No subject can legally commit hostilities, or capture property of an enemy, where either expressly or constructively the sovereign has prohibited it. *Id.*

63. But if he does, the sovereign may ratify his proceedings, and make them valid. *Id.*

64. What constitutes probable cause of capture may depend on the ordinances of the country of the captors. *The Invincible, 2 Gallis. 29.*

65. A special order of the sovereign, though contrary to the law of nations, justifies the captors in all tribunals of prize. But *quære*, whether a neutral tribunal of prize would lend its aid to enforce a capture made under such order. *Maissonnaire v. Keating, 2 Gallis. 335.*

PRIZE III.

Questions of proprietary interest and freight.

66. By the Spanish treaty of 1795, *free ships make free goods*; but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been duly annexed to the treaty, the proprietary interest of the ship is to be proved according to the ordinary rules of the Prize Court, and if thus shown to be Spanish, will protect the cargo, on board, to whomsoever the latter may belong. *The Amiable Isabella, 6 Wheat. 69.*

67. A question of fact respecting the proprietary interest in prize goods, captured by an armed vessel fitted out in violation of the statutes of neutrality of the United States. *The Gran Para, 7 Wheat. 490.*

68. A question of fact upon the *bona fides* of an alleged sale of Portuguese ships, and their cargoes, which had been captured in violation of our neutrality. Restitution to the original owners decreed. *The Monte Allegre, 7 Wheat. 520.*

69. Captors are not in general entitled to freight on the capture of neutral property on board of an enemy's ship, unless the goods are carried to the port of destination, within the intent of the contracting parties. *The Ann Green, 1 Gallis. 274.*

70. But if the property be ultimately bound to the market, where the captors carry the ship, or the proceeds are to go there indirectly, a direct communication being prohibited, freight is due to the captors. *Id.*

71. Freight is not a proper item of damage for an illegal capture, where the voyage has not been lost by such capture. *The Lively, 1 Gallis. 315.*

72. The doctrine as to *stoppage in transitu* applies only to the case of insolvency, and presupposes, not only that the property of the goods has passed to the consignee, but that the possession is in a third person in transit to the consignee. It cannot apply to a case, where the actual or constructive possession remains in the shipper or his exclusive agents. *The San Jose Indiano, 2 Gallis. 294.*

73. In general, the rules of the Prize Court as to the vesting of property are the same as those at common law. *Id. 295.*

74. Where a merchant abroad, in pursuance of orders to purchase goods, sells his own goods, or purchases goods for his correspondent, *on his own credit*, no property vests in the correspondent, until he has done some notorious act, to divest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. *Id.*

75. A shipment to the shipper's own agent, of goods so purchased, giving him a right to hold them, until he has made arrangements with his correspondent, does not divest the title or possession of the shipper. *Id.*

76. Where a shipment is made to partners, they are held by the Prize Court to take in equal moieties, unless upon the original papers a different proportion appears. *Id. 303.*

77. No freight is payable, when the voyage is broken up, after its commencement, by an interdiction of commerce with the port of destination, or by accident, or superior force. *The Saratoga*, 2 *Gallis*. 179.

78. A neutral ship, engaged in transporting provisions for the use of the army of a belligerent, which army is in a neutral country and engaged in a distinct war with a third belligerent, is not entitled to freight. *The Commercen*, 2 *Gallis*. 261.

79. The general rule is, that the neutral carrier of enemy's property, is entitled to freight. But if the neutral be guilty of fraudulent or unneutral conduct, or have interposed himself to assist the enemy in carrying on the war, he is deemed to have forfeited his title to freight. *Id.*

80. If a shipment be made without, or contrary to orders, it still remains at the risk of the shippers. *The Francis*, 2 *Gallis*. 391.

81. If a shipper have general discretionary orders to ship goods, the shipment will remain at his own risk, unless at the time of shipment, by some unequivocal act, he appropriates the shipment to his correspondent. Until such appropriation, the property is not changed. *Id.*

82. Every shipment remains on the account and risk of the shippers, unless there be an express or implied authority to change the proprietary interest, and put the shipment at the risk of the consignee. *The San Jose Indiano*, 1 *Mason*, 38.

83. Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the cargo so restored. *Sampayo v. Salter*, 1 *Mason*, 43.

PRIZE IV.

Domicil and national character.

84. The commission is conclusive proof of the national character of a public ship. *The Santissima Trinidad*, 7 *Wheat*. 335.

85. During the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by us belligerent nations, and entitled to all the sovereign rights of war against their enemy. *Id.* 337.

86. *Quære*, as to the right of expatriation? *Id.* 347.

87. Supposing such a right to exist, it cannot be exercised without a *bona fide* change of domicil, and can never be asserted as a cover for fraud, or to justify a crime against the country, or any violation of its laws. *Id.* 348.

88. The national character of a party depends upon his domicil. A British subject domiciled in the United States, though temporarily absent in a British island, is, as to purposes of trade, held to be an American merchant. *The Ann Green*, 1 *Gallis*. 274. S. P. *The San Jose Indiano*, 2 *Gallis*. 285.

89. A shipment made to Canada by a British subject domiciled in the United States, but temporarily at Jamaica, in his character as a British subject, is not affected with a hostile character, if made in time of peace, war breaking out pending the voyage. But it is otherwise, if such shipment be made pending a known war. *Id.*

90. The general rule is, that no claim shall be admitted against the evidence of the ship's papers, and the reason is that fraud may be suppressed and discouraged. If a party will undertake to cover his property with a particular character, he shall be bound by its consequences. But an exception as old as the rule itself is, that it applies to cases during open war, and not before the commencement of it, or in time of peace. *Id.*

91. A trade, which is exclusively confined to the subjects of a country, must follow the situation of that country as to peace or war, and be deemed hostile or neutral accordingly; and in such a trade, it is immaterial whether the shipment be made in peace or war. *Id.*

92. In time of war, property cannot change its character *in transitu*; nor can property shipped, to become the property of an enemy, be protected by the neutrality of the shipper. *Id.* S. P. *The Francis*, 1 *Gallis*. 445.

93. If a party put himself *in itinere*, to return to his native country, he is already deemed to have assumed the native character. *The St. Lawrence*, 1 *Gallis*. 467.

94. So, if he be a naturalized citizen, and returning to his acquired country. *The Francis*, 1 *Gallis*. 614.

95. On a declaration of war, the citizens are not bound to return from foreign countries, unless so ordered by the government. *The Joseph*, 1 *Gallis*. 545.

96. A naturalized citizen of the United States, domiciled in the enemy country at the breaking out of war, is deemed an enemy, and his property is confiscable as such. *The Francis*, 1 *Gallis*. 614.

97. A ship is deemed to belong to the country where the owners reside. *The San Jose Indiano*, 2 *Gallis*. 284.

98. If a ship carry a neutral flag, but the owners reside in an enemy's country, she is condemnable as prize of war. *Id.*

99. Courts of prize look to the *legal* interest in the ship, and will not recognize neutral *equitable* interest. *Id.*

100. The property of a person may acquire a hostile character, although his residence be neutral. Therefore, where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing, and with the same advantages as native resident subjects, his property employed in such trade is deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may. *Id.* 285.

101. The treaty of 1810, between Great Britain and Portugal, did not prevent British merchants, resident in the Brazils, from acquiring the neutral character of their domicil. *Id.* 292.

102. If there be a house of trade established in the enemy's country, the property of all the partners in the house is condemnable as prize, notwithstanding some of them have a neutral residence. But such connection will not affect the other separate property of the partners having a neutral residence. *Id.* 289.

103. If such house ship goods, *on their own account*, to one of the partners, who is domiciled in a neutral country, it is liable as prize. But it is otherwise, if the shipment be made by the order of the partner, *on his separate account and risk*. *Id.* 289.

104. If a person domiciled in the enemy's country be a partner in a house of trade established in a neutral country, and ship goods to them upon their *joint* account and risk, the goods are not liable to condemnation. But it is otherwise if shipped for his separate account. *Id.* 291.

105. In general, the residence of a stationed agent in an enemy's country will not affect the trade of the neutral principal with a hostile character. But this is true only as to the ordinary trade of a neutral, as such, carried on in the ordinary manner; for if such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy, in the same manner, and with the same benefits, as a native merchant, it is deemed hostile. *Id.* 291.

106. Therefore, if a partner in a neutral house be domiciled in the enemy's country, and engaged in its general commerce, *for the benefit of his neutral house*, the property is condemnable as prize. *Id.* 291.

107. Where a shipment is made in an enemy's vessel, in a voyage from an enemy's country, it is presumed to belong to enemies, unless a distinct neutral character be impressed upon it. *Id.* 302.

108. Where a shipment is made to a firm, and the persons who compose it do not appear, further proof will be required of the names and domicil of the parties. *Id.* 298.

109. All goods found on board of an enemy's ship, are presumed to be the property of the enemy, unless a distinct neutral character is impressed upon and

accompanies them. *The Flying Fish*, 2 *Gallis*. 374. *The London Packet*, 1 *Mason*, 14.

110. If the shippers in a *hostile* ship neglect to put on board any documentary evidence of its neutral character, they will not be allowed the benefit of further proof. *The Flying Fish*, 2 *Gallis*. 374.

111. Where a captured cargo belonged, one half to a neutral and the other half to an enemy, and there were papers on board from which the enemy's interest might be discovered, it was held, that the share of the neutral should not be subjected to confiscation, in consequence of his having persisted in a claim for the whole made by his agent, nor of his having sworn falsely that he was solely interested; such affidavit not having been employed for any fraudulent purpose in the cause, and not having been filed, until after an order for further proof had passed, as to one moiety, and a decree of condemnation had, by consent, been entered against the other moiety. *The Betsey*, 2 *Gallis*. 377.

112. If a neutral fraudulently attempt to cover and claim an enemy's interest in a Prize Court, he will not be permitted to introduce further proof to show his own neutral interest in the same property. *Id.*

113. A neutral cannot lawfully become the carrier of provisions for the supply of the army of one of the belligerents, although such army may be in a neutral country, and directly engaged in hostilities only against a third belligerent. A neutral ship engaged in such traffic is not entitled to freight. *The Commercen*, 2 *Gallis*. 261.

114. Domicil in the enemy's country gives a hostile character; and the same principle has been applied to a house of trade established in the enemy's country, though the parties might have a neutral domicil. *The Society, &c. v. Wheeler*, 2 *Gallis*. 130.

115. The same rule would extend to a corporation established in the enemy's country. *Id.*

116. An American vessel does not forfeit her neutral character merely by hoisting a foreign flag in conformity to the regulations of a particular trade. And Spanish clearances found on board, are not proofs of double papers, if no other marks of fraud appear. *Arnold v. Delcoll, Bee*, 5.

117. A sea-letter is not the only document necessary to establish the neutral character of a vessel belonging to the United States under the treaty with France. *Tunno v. Preary, Bee* 6.,

PRIZE V.

Liability to capture for navigating under the enemy's license.

118. A license or protection from the enemy, found on board an American vessel, on a voyage to a neutral port in alliance with the enemy, the terms of which were such, as to prove an intercourse with the enemy and a direct subserviency to his interests, was held to subject the vessel and cargo to confiscation, as prize of war. *The Julia*, 1 *Gallis*. 594.

119. Semble, that such a license or protection, without any such peculiar terms, would be illegal, and subject the property to confiscation, as prize. *Id.*

120. Under the second section of the act, 2 August, 1813, ch. 56, a prize allegation cannot be sustained for using a British license, unless the vessel be seized *in delicto*, during the voyage. If the voyage be entirely ended, the offence is purged. *The Saunders* 2 *Gallis*. 210.

121. *Quere*, How it would be on an information on the first section of the same act? *Id.*

122. *Quere*, whether a piece of cloth or any other agreed signal, is a pass within the meaning of the first section of the act of 2d August, 1813, ch. 56? *United States v. Briggs*, 2 *Gallis*. 363.

PRIZE VI.

Contraband, blockade, and resistance of visitation and search.

123. Our municipal laws do not prohibit the trade in contraband articles. It is merely subject, by the laws of nations, to the penalty of confiscation, in case of capture. *The Santissima Trinidad*, 7 Wheat. 340.

124. The right of visitation and search does not exist in time of peace; but ships of war sailing under the authority of their government in time of peace, have a right to approach other vessels at sea for the purpose of ascertaining their real characters, so far as the same can be done without the exercise of the right of visitation and search. *The Marianna Flora*, 11 Wheat. 1.

125. No vessel is bound to await the approach of armed ships under such circumstances; but such vessel cannot lawfully prevent their approach, by the use of force, upon the mere suspicion of danger. *Id.*

126. In cases of breaches of blockades, and of contraband of war, the vessel must be captured *in delicto*; otherwise the offence is purged. *The Saunders*, 2 Gallis. 215.

127. If, therefore, the port of destination have become neutral, or the blockade have been raised, before the capture, the *corpus delicti* is deemed to be extinguished. *Id.*

128. *It seems*, that provisions, when destined to a port of naval equipment of the enemy, and *a fortiori*, if destined for the supply of his army, become contraband, and subject the vessel and cargo to confiscation by the other belligerent—more especially, if the country of the captured vessel be at war with the country to which she is destined. *Maissonnaire v. Keating*, 2 Gallis. 325.

129. Provisions are not treated as contraband, when they are the growth of the neutral exporting country. *The Commercen*, 2 Gallis. 265.

PRIZE VII.

Trade with the enemy, and breach of municipal law.

130. During war all trade with the enemy, unless by permission of the sovereign, is interdicted, and subjects the property engaged therein to confiscation. *The Rapid*, 1 Gallis. 295. S. P. *The St. Lawrence*, 1 Gallis. 467. *The Alexander*, 1 Gallis. 544. *The Joseph*, 1 Gallis. 545.

131. A citizen of the United States has not a right to withdraw his property, acquired before the war, from the enemy's country, after he has full knowledge of the war, without the permission of government. *The Rapid*, 1 Gallis, 295. S. P. *The St. Lawrence*, 1 Gallis. 467.

132. If a vessel be sent from the United States, after knowledge of war, to the enemy's country, to withdraw such property, the vessel and cargo are confiscated *jure belli*. *The Rapid*, 1 Gallis. 295. S. P. *The St. Lawrence*, 1 Gallis. 467.

133. The property of citizens taken trading with the enemy, is considered as *quasi* enemy's property. *Id.*

134. If property forfeited to the United States by a breach of the non-importation act, 1809, ch. 91, be captured in a trade from an enemy's port to the United States, the captors are entitled to it. *Id.*

135. A shipment made by an enemy shipper to his correspondent in America, to belong to the latter, at his election, in twenty-four hours after arrival, is liable to condemnation as hostile property. *The Francis*, 1 Gallis. 445.

136. In such case, an election made during the transit will not merge the hostile character of the property. *Id.*

137. An obstinate suppression of the ship's papers, &c. coupled with a voyage from an enemy's country, is sufficient cause of condemnation. *The St. Lawrence*, 1 Gallis. 467.

138. A voyage from an enemy port with a cargo on board, without the license of our government, is of itself a probable cause for capture. *The Liverpool Packet*, 1 Gallis. 513.

139. A shipment made from the enemy country, after a knowledge of the war, by an American citizen, subjects the property to confiscation as prize of war. *The Mary*, 1 Gallis. 620.

140. A trade to a neutral port is not illegal, although the public enemy derive benefit thereby, unless such trade be carried on in connection with, or subservient to, hostile interests and policy. *The Liverpool Packet*, 1 Gallis. 513.

141. The United States may proceed against property found engaged in trade with the enemy, as prize of war. *The Eliza*, 2 Gallis. 4.

142. A shipment, made after a known war, by an American citizen, from an enemy's port to a port in his colonies, is illegal by the law of war. It is a trading with the enemy. *The Diana*, 2 Gallis. 93.

143. At common law, any individual might seize for the King, and upon this ground it has been held, that public or private armed ships may seize for violation of a statute. But, in such case, it is at the peril of the party making the seizure. *The Rover*, 2 Gallis. 241.

144. A citizen of the United States may lawfully, during a war with a foreign country, draw a bill on one of its subjects: such an act not leading to any injurious intercourse, nor amounting to a trading with the enemy. *Barker v. United States*, 1 Paine, 156.

145. If trading with an enemy be cause of condemnation, which it clearly is, *a fortiori*, carrying despatches to the enemy, by an American vessel, in time of war, is so. *The Tulip*, 3 Wash. C. C. R. 181.

PRIZE VIII.

Ransoms, recapture and salvage.

146. The rights of salvage may be forfeited by spoliation, smuggling, or other gross misconduct of the salvors. *The Bello Corrunes*, 6 Wheat. 152.

147. In order to entitle to salvage, as upon a recapture or rescue from an enemy, the property must have been taken from the actual or constructive possession of the enemy. *The Ann Green*, 1 Gallis. 274.

148. It is competent for a friendly belligerent to ransom the property of a neutral after capture. *Maissonnaire v. Keating*, 2 Gallis. 337.

149. Duress, arising from threats of destruction of vessel and cargo, cannot be admitted to avoid a contract of ransom, where the capture was justified by probable cause. *Id.*

150. A ransom is rather a relinquishment of all the interest of the captors, than a repurchase from them of an actual vested right. *Id.*

151. There seems to be no legal difference between a ransom of the property of an enemy, or of a neutral; and indeed the ransom of a neutral stands upon stronger ground than that between enemies. *Id.*

152. The Admiralty has exclusively cognizance of suits on ransom bills—but an action may be sustained at Common Law on a bill of exchange given as collateral security for the payment of the ransom bill. *Id.*

153. It seems, that the ransoming of captured property must not be made at any distance of time or by any new voyage undertaken for this purpose. *The Wellington*, 2 Gallis. 104.

154. The nett proceeds of the ship and cargo, at the port of discharge, and not the invoice cost of the cargo; with the wages of all the persons belonging to the ship, must contribute to the ransom. *Girard v. Ware*, 1 Peters, C. C. R. 142.

155. If an officer, acting as such, exceeds the bounds of his official duty, by giving extraordinary assistance to save property, he is entitled to salvage. *The Tigre*, 3 Wash. C. C. R. 567.

156. It is no objection to a claim for salvage, that the interference or assistance of the salvor, did not arise from a desire to preserve the property, or benefit the owner. *Id.*

157. Salvage was allowed upon the recapture of a ransomed ship; the ransom bill declaring that the sum agreed upon therein should only be payable upon the arrival of the vessel at her port of destination, where she never arrived. *Moodie v. The Harriet, Bee*, 128.

158. In case of recapture by a public vessel of war, salvage can only be ascertained by sale of the recaptured property; unless both parties consent to an appraisalment. *Cross v. The Dolphin, Bee*, 153.

159. Compensation was decreed for money surrendered to prevent the capture or burning of a vessel and her cargo. *Hunter v. The Homily, Bee*, 154.

160. Salvage is not due for rescuing the vessel of a neutral out of the hands of a belligerent who took possession of her for a supposed breach of treaty or of the law of nations. *Waite v. The Antelope, Bee*, 233.

PRIZE IX.

Treaty of Peace.

161. Damages were decreed for the amount of goods taken out of a prize captured after the treaty of peace of 1815. *The Ulpiano*, 1 Mason, 91.

PRIZE X.

Practice of the Prize Court.

162. By the rules of the Prize Court, the *onus probandi* of a neutral interest rests on the claimant. *The Amiable Isabella*, 6 Wheat. 77.

163. The evidence to acquit or condemn, must come, in the first instance, from the ship's papers, and the examination of the captured persons. *Id.*

164. Where these are not satisfactory, further proof may be admitted, if the claimant has not forfeited his right to it by a breach of good faith. *Id.*

165. On the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows. *Id.*

166. The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation. *Id.*

167. A foreign consul has a right to claim or libel, *in rem*, where the rights of property of his fellow subjects are in question, without any special authority from those for whose benefit he acts. *The Bello Corrunes*, 6 Wheat. 152.

168. But a consul cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled. *Id.*

169. Whatever difficulty there may be, under our municipal institutions, in punishing, as pirates, citizens of the United States who take from a State at war with Spain, a commission to cruise against that power, contrary to the 14th article of the Spanish treaty, yet there is no doubt that such acts are to be considered as piratical acts for all civil purposes, and the offending parties cannot appear, and claim in our Courts the property thus taken. *Id.*

170. *It seems*, that the terms, "a State with which the said King shall be at war," in the 14th article of the treaty, include the South American provinces which have revolted against Spain. *Id.*

171. But, however this may be, the neutrality act of June, 1797, c. 1, extends the same prohibition, with all its consequences, to a colony revolting, and making war against its parent country. *Id.*

172. In the case of such an illegal capture, the property of the lawful owners cannot be forfeited, for a violation of the revenue laws of this country, by the captors, or by persons who have rescued the property from their possession. *Id.*

173. Where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel built, armed, equipped, and owned in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners. *La Conception*, 6 *Wheat.* 235.

174. Where a transfer of the capturing vessel in the ports of the belligerent State, under whose flag and commission she sails on a cruise, is set up in order to legalize the capture, the *bona fides* of the sale must be proved by the usual documentary evidence, in a satisfactory manner. *Id.*

175. In cases of capture, supposed to be in violation of our neutrality, where the enlistment of men within our territory is proved, the *onus probandi* is thrown on the claimant to prove that such enlistment was lawful as being of the subjects of the State under whose flag the capture was made. *The Santissima Trinidad*, 7 *Wheat.* 342.

176. The sixth article of the Spanish treaty of 1795, only provides for the restitution of Spanish ships captured within our jurisdiction. *Id.*

177. This Court will restore to the former owners property captured in violation of the neutrality of the United States, where it is claimed by the original wrong-doer, though it may come back to his possession after a regular condemnation as prize. *The Arrogante Barcelones*, 7 *Wheat.* 496.

178. *Quære*, How far a condemnation would protect the title of a third person, being a *bona fide* purchaser, without notice, in such a case? *Id.*

179. *Quære*, Whether a regular sentence of condemnation in a Court of the captor, or his ally, the captured property having been carried *infra præsidia*, will preclude the Courts of this country from restoring it to the original owners, where the capture was made in violation of our laws, treaties, and neutral obligations? *La Nereyda*, 8 *Wheat.* 108.

180. Whoever claims under such a condemnation, must show that he is a *bona fide* purchaser, for a valuable consideration, unaffected with any participation in the violation of our neutrality by the captors. *Id.*

181. Whoever sets up a title, under a condemnation, as prize, is bound to produce the libel, or other equivalent proceeding, under which the condemnation was pronounced, as well as the sentence of condemnation itself. *Id.*

182. *Quære*, Whether a condemnation in the Court of an ally of property carried into his ports by a co-belligerent, is valid? *Id.*

183. Where an order for further proof is made, and the party disobeys, or neglects to comply with its injunctions, Courts of Prize generally consider such disobedience, or neglect, as fatal to his claim. *Id.*

184. Upon such an order, it is almost the invariable practice for the claimant, (besides other testimony) to make proof by his own oath of his proprietary interest, and to explain the other circumstances of the transaction; and the absence of such proof and explanation always leads to considerable doubts. *Id.*

185. In cases of collusive capture, papers found on board one captured vessel may be invoked into the case of another, captured on the same cruise. *The Experiment*, 8 *Wheat.* 261.

186. A commission, obtained by fraudulent misrepresentations, will not vest the interests of prize. *Id.*

187. But a collusive capture, made under a commission, is not, *per se*, evidence that the commission was fraudulently obtained. *Id.*

188. A collusive capture vests no title in the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property. *Id.*

189. Collusive captures and violations of the revenue laws, committed by a private armed vessel, are a breach of the condition of the bond given by the owners, under the prize act of June 26, 1812, c. 430, s. 3. If such breach appear upon demurrer, the defendants are not entitled to a hearing in equity, under the judiciary act of 1789, c. 20, s. 26. *Greely v. United States*, 8 *Wheat.* 257.

190. A non-commissioned captor can only proceed in the Prize Court as for salvage, the amount of which is discretionary. *The Dos Hermanos*, 10 *Wheat.* 306.

191. The Appellate Court will not interfere in the exercise of this discretion, as to the amount of salvage allowed, unless in a very clear case of mistake. *Id.*

192. Although a consul may claim for "subjects unknown" of his nation, yet actual restitution cannot be decreed without specific proof of the proprietary interest. *The Antelope*, 10 *Wheat.* 66.

193. A stipulation taken in an Admiralty suit is a substitute for the thing itself, and the stipulators are amenable to the exercise of all those powers which the Court could enforce if the thing itself were still in its custody. *The Palmyra*, 12 *Wheat.* 1.

194. In every case of a proceeding for condemnation, upon captures made by the public ships of war of the United States, whether as prize strictly *jure belli*, or under statutes of Congress in the nature of prize ordinances, the proceedings are in the name of the United States, who prosecute for themselves as well as the captors, and the latter cannot control the proceedings. *Id.*

195. A previous prosecution *in personam* against the offenders, is not necessary, under the piracy act, to found the proceeding *in rem* against the captured property. *Id.*

196. Where an objection to the testimony of the seizing officer is waived in the Court below, an objection to it on the ground of interest cannot be made on appeal. *Id.*

197. Upon an appeal from a mandate to carry into effect a former decree of the Court, nothing is before the Court but the proceedings subsequent to the mandate. *The Santa Maria*, 10 *Wheat.* 431.

198. But the original proceedings are always before the Court, so far as is necessary to determine any new points in controversy between the parties, which are not terminated by the original decree. *Id.*

199. After a general decree of restitution in this Court, the captors, or purchasers under them, cannot set up in the Court below new claims for equitable deductions, meliorations, and charges, even if such claims might have been allowed, had they been asserted before the original decree. *Id.*

200. Nor can the claimants, or original owners, in such a case, set up a claim for interest upon the stipulation taken in the usual form, for the appraised value of the goods, interest not being mentioned in the stipulation itself. *Id.*

201. Nor can interest be decreed against the captors personally, by way of damages for the detention and delay, no such claim having been set up upon the original hearing in the Court below, or upon the original appeal to this Court. *Id.*

202. Although probable cause of seizure will not exempt from costs and damages, in seizures under mere municipal statutes, unless expressly made a ground of justification by the law itself, this principle does not extend to captures *jure belli*, nor to marine torts generally, nor to acts of Congress authorizing the exercise of belligerent rights to a limited extent, such as the piracy acts of the 3d of March, 1819, ch. 75, and the 15th of May, 1820, ch. 113. *The Palmyra*, 12 *Wheat.* 17.

203. The first hearing in prize causes is to be on the ship's papers, and the preparatory evidence of the crew. Further proof is admitted only when these present a case of doubt or difficulty. *The Ann Green*, 1 *Gallis.* 274. *The Sally*, 1 *Gallis.* 409. *The Rapid*, 1 *Gallis.* 297.

204. Papers not given up by the captured crew on the first examination in preparatory will not be admitted afterwards. If a witness suppress material facts on his examination in preparatory, he shall not be permitted to supply the defect by a supplementary affidavit. The commissioners to take the answers on the standing

interrogatories should require full and minute details of all material facts. *The Ann Green*, 1 Gallis. 274.

205. The captors are entitled to their expenses in all cases of further proof *Id.*

206. Where, after an illegal capture, the vessel and cargo have been wholly lost, the prime cost and interest is the measure of damages. Freight is not a proper item, where the voyage has not been lost by the capture. Supposed loss of profits no proper item of damage in such case. *The Lively*, 1 Gallis. 315.

207. Claims in prize causes should be made by the parties themselves, if within the jurisdiction, and not by mere agents. The captors have a right to the answers of claimants on oath. *Id.* *The Sally*, 1 Gallis. 401. *The St. Lawrence*, 1 Gallis. 467.

208. Where an injury is alleged to the cargo after it came to the possession of the captors, it should be ascertained under the direction of the Prize Court, by a survey and appraisement or sale. *Id.*

209. Where it is referred to commissioners to state the amount of damages in a case of illegal capture, the report should be special, and state the items of the allowance in detail. *The Lively*, 1 Gallis. 315.

210. Commissioners appointed to state damages should not hear *ex parte* evidence without notice to the other party. *Id.*

211. If captors wantonly injure the captured crew, the Prize Court will award damages for personal ill usage. *Id.*

212. Further proof is never allowed to a party, who is guilty of fraud or illegal conduct. It is granted only to honest ignorance or mistake. *The Sally*, 1 Gallis. 401. S. P. *The Liverpool Packet*, 1 Gallis. 513. *The Alexander*, 1 Gallis. 532.

213. On further proof, the affidavits of the captors are admissible evidence, without a release. *The Sally*, 1 Gallis. 401.

214. Where a claim is registered, the claimant is liable to pay all expenses, which have accrued in consequence of his claim. *The Sally*, 1 Gallis. 401.

215. In prize causes, before a hearing, the property is never delivered to either party on bail, unless by consent. *The Euphrates*, 1 Gallis. 451. S. P. *The Diana*, 2 Gallis. 93. *The George*, 2 Gallis. 249.

216. If it be perishable, the proper remedy is by an appraisement and sale; and in like manner the Court will decree a sale pending the proceedings, for any other justifiable cause upon sales under such decrees, the proceeds must be brought into Court, and deposited in the registry, subject to the future order of the Court. *Id.*

217. After a hearing, the property may, in the discretion of the Court, be delivered on bail. *Id.* S. P. *The Diana*, 2 Gallis. 93.

218. On the original hearing, if the character and origin of the captured property be in question, the Court should order a survey and report. *The Liverpool Packet*, 1 Gallis. 513.

219. Where on the original preparatory evidence, the fact of capture is admitted, farther proof ought not to be admitted, to create doubts, as to the fact of capture. *The Alexander*, 1 Gallis. 532.

220. An alien enemy cannot sustain a claim in a prize Court; nor can a citizen claim the property of an enemy in a prize Court, upon an alleged sale since the war. *The Cargo of the Emulous*, 1 Gallis. 563.

221. Important documents, which were the cause of capture, having been surreptitiously taken from the possession of the prize master, exact copies, taken by him and verified by his affidavit, were admitted as good evidence. *The Julia*, 1 Gallis. 594.

222. If in a prize cause, the claimant appeal and desert his appeal, the Circuit Court may affirm the decree of the District Court, with costs. *The Betsey*, 1 Gallis. 416.

223. On an appeal to the Circuit Court, the property follows the appeal into that Court, and is no longer subject to the interlocutory orders of the District Court. It is otherwise with regard to the Supreme Court, whose decrees are remanded to

the Circuit Court for execution, and therefore the property always remains in the custody of the latter. *The Grotius*, 1 *Gallis*. 503.

224. The District Court has no authority, after an appeal, to bail or sell the property. *Id.*

225. The commander of a squadron, to whose command a ship of war is attached, and under whose orders she sails, is entitled to the flag-twentieth of all prizes made by such ship, although the other part of the squadron may never have sailed on the cruise, in consequence of a blockade by a superior force. *Decatur v. Chew*, 1 *Gallis*. 506.

226. To deprive such a commander of his flag-twentieth on account of having left his station, it is indispensable that some local station should have been assigned him. *Id.*

227. Prize agents have an authority coupled with an interest, and a lien on the proceeds for their disbursements and commissions. Their authority will not be disturbed until all these are satisfied, but, this being done, the officers and crew have a right to receive their shares, by themselves or their particular agents directly from the Court. *The St. Lawrence*, 2 *Gallis*. 20.

228. Prize agents *de facto*, though irregularly appointed, have a lien for their disbursements and commissions. *Id.*

229. In the absence of all other regular prize agents the owners of the ship and their agents are entitled to the trust and management of the property. *Id.*

230. A commander of a privateer, who is authorized to award certain reserved shares among the most deserving, cannot award a share to himself. *Id.*

231. The custody of the papers of captured vessels belongs exclusively to the Prize Court; and it is the duty of the captors, on arrival, immediately to deliver them into the registry, on oath. *The Diana*, 2 *Gallis*. 93.

232. During war, no claim in opposition to the ship's papers and preparatory evidence, is ever admitted in a Prize Court. *Id.*

233. No commission to take evidence in an enemy's country is allowable by the practice of the Prize Courts. *Id.*

234. *It seems*, that the Appellate Court may direct the claimant to account on oath for property which has been delivered on bail by the District Court in a gross case of illegality. *Id.*

235. Prize goods, brought in by ships of war of the United States, are liable to the payment of duties, as to the moiety belonging to the officers and crew of the capturing ship; but no duties are payable on the moiety belonging to the *United States*; but the whole of that moiety belongs to the navy pension fund. *The Liverpool Hero*, 2 *Gallis*. 164.

236. The act of 2d August, 1813, ch. 48, releasing one third of the duties accruing on goods captured and brought into the United States by any private armed vessel of the United States, did not apply to the case of a vessel captured and brought in before the passing of the act, but not condemned until after it had passed. *Prince v. United States*, 1 *Gallis*. 204.

237. Duties accrue as soon as the goods are voluntarily imported, and this as well as to prize goods, as any other; for the condemnation relates back to the time of importation. *Id.*

238. Where there is probable cause of capture, the captors are justified, and exonerated from all losses and damages sustained by reason of the capture. *The Rover*, 2 *Gallis*. 240. *Maissonnaire v. Keating*, 2 *Gallis*. 336.

239. On a motion to proceed to adjudication, the cause is to be heard in the same manner and upon the same principles, as upon a libel by the captors; and consequently the *onus probandi* rests on the claimant. *The Rover*, 2 *Gallis*. 240.

240. Where, after capture, the vessel has been recaptured by the enemy, and proceeded against in a Court of Prize, the Court will not suffer a part of the papers from such Court to be read, to show that there was no original cause of capture, unless the whole papers are produced. *Id.*

241. There may be an original proceeding for damages against captors without first filing a claim; but usually a claim is first given, and in all cases, the Court will require an affidavit. *Id.*

242. The removal of prize goods is an irregularity, but is indulged under certain circumstances. *The Arabella and Madeira, 2 Gallis. 368.*

243. A Court of Prize will never aid a party who has sought to impose upon it. *The Betsey, 2 Gallis. 385.*

244. If, upon the ship's papers, it be doubtful, whether the property captured as prize belong to an enemy, it is not usual to proceed immediately to condemnation, although no claim be interposed. But if, in such case, no claim be interposed within a year and a day, condemnation is of course to the captors. *The Avery, 2 Gallis. 386.*

245. The Clerk is entitled to commissions upon proceeds of prize property sold by interlocutory order, and paid into the Court by the marshal. *Id.*

246. In taxing the costs in prize causes, where there are several claims, some of which are disposed of by a final decree of condemnation, while others stand suspended upon appeal, the practice has been to tax the costs and expenses, which have accrued *specially* upon each claim so finally disposed of, as a separate charge against the same, and to add thereto an average proportion of the general costs and expenses, which have accrued in reference to all the claims in the cause. *The Hiram, 2 Gallis. 60.*

247. Further proof in prize causes is never admitted by way of oral testimony; but always by written evidence and depositions. *The George, 2 Gallis. 249.*

248. In cases of joint capture by privateers, they share in proportion to the number of men composing their respective crews. *The Despatch, 2 Gallis. 1.*

249. No delivery of property on bail can legally be made in cases where the United States are a party, without due notice to the district attorney, that he may have a hearing before the Court. *Robbins, ex parte, 2 Gallis. 322.*

250. *Quære*, If a delivery on bail can be ordered by the Court in vacation before the return term of the process? *Id.*

251. Though an agent may claim, in a Prize Court, yet if sufficient time intervene, the principal must support it by his affidavit. *The Betsey, 2 Gallis. 383.*

252. If no claim is interposed to captured property within a year and day, it is condemned to captors. This is by the immemorial usage of the Admiralty, and is found in many analogous cases at Common Law. *The Avery, 2 Gallis. 388.*

253. If a person has in the acts of Court asserted himself as part owner of a privateer, he will be responsible as such owner for damages assessed against such privateer, although his name be not in the ship's papers. *The Mary, 1 Mason, 365.*

254. Prize money must be distributed according to some written agreement of the parties; otherwise, it is distributable according to the 4th sec. of the prize act of the 26th June, 1812, ch. 107. *The Dash, 1 Mason, 4.*

255. A parol agreement as to distribution is void. *Id.*

256. A parol assignment of a share in prizes is void. *Id.*

257. If the shipping articles omit to state the shares to which some of the officers and crew are entitled, they are still entitled to claim their shares under the prize act. *Id.*

258. When the captors have been guilty of irregularity in not bringing in the papers, or the master of the captured ship, further proof will be ordered. *The London Packet, 1 Mason, 14.*

259. The consul of a nation may claim on behalf of its subjects in the absence of any authorized agent. *Id.*

260. Probable cause is a sufficient justification of a capture. But such protection may be forfeited by subsequent misconduct or negligence. *The George, 1 Mason, 24.*

261. Captors are bound to good faith and ordinary diligence; and are therefore liable for ordinary negligence. *Id.*

262. To constitute probable cause of capture, it is not necessary that there should be *prima facie* evidence to condemn. It is sufficient if there be circumstances which warrant a reasonable suspicion of illegal conduct. *Shattuck v. Maley*, 1 Wash. C. C. R. 248.

263. In general, the Prize Court will not trust a claimant with an order for further proof, who has shown himself capable of abusing it. *The San Jose Indiano*, 1 Mason, 38.

264. Defects of the case on further proof inflame suspicions. *Id.*

265. If a claim be interposed by the United States in a prize proceeding upon a seizure for a forfeiture under the non-importation acts, and the title of the captors and the claimants be defeated, the property will be condemned to the United States, subject to distribution according to the provisions of the act of 2d March, 1799, ch. 128, sec. 91. *The Brig Gefla*, 1 Mason, 88.

266. Where a cruise was broken up by the wrongful desertion of the crew, after the privateer returned to her home port in consequence of distress, and the owners were thereby obliged to abandon the cruise, and a new one was undertaken by a crew composed partly of other persons, it was held that the first cruise was completely determined, and that no persons employed in the *first* cruise and not in the second cruise, were entitled to shares in the prizes made in the *second* cruise. *Blanchard v. Haven*, 1 Mason, 346.

267. Where a capture is lawful, the subsequent bringing in of the captured vessel is not a cause for giving damages. *The Marianna Flora*, 9 Mason, 116.

268. The captured, who has omitted to enforce a decree of a Superior Court, reversing the decree of a Court of Admiralty, cannot claim, as damages, the loss he may have sustained by a depreciation of the funds in which the proceeds of the capture may be invested. He should have applied to the Court below, to enforce the decree of the Court of Appeals; and, omitting so to do, the loss will fall upon him. *Carson v. Jennings*, 1 Wash. C. C. R. 129.

269. Where part of the crew of a privateer were put on shore without lawful cause, they were held to be entitled to their proportion of prizes taken in their absence during the cruise. *Mahoon v. The Gloucester*, 2 Peters' Adm. Decis. 493.

270. Sale on land in the ports of the United States cannot be prevented by their Courts of Admiralty, in cases of lawful capture on the high seas, by French privateers duly commissioned. *British Consul v. The Amity, Bee*, 89.

271. Belligerents have no right, unless secured by treaty, to sell their prizes in a neutral port. The neutral government may grant permission, but ought not to do so, unless all the powers at war can be put upon an equal footing. *Consul of Spain v. Consul of G. Britain, Bee*, 263.

272. If at the time of a prize taken by a vessel of war, another armed vessel be in sight and in a possible condition to join in the battle, she will be allowed a share of the prize in proportion to her men and guns; but not if it be manifestly impossible for her to take any part in the battle. *Rice v. Taylor, Bee*, 386. *Pray v. The Recovery, Bee*, 393.

SALE.

- I. *Sale of personal property.* (A) *Warranty.* (C) *Rule of damages for breach of the contract.* (D) *When the property vests.*
- II. *Sale of real property.* (A) *Sale of land at auction.* (C) *Lien of vendor for unpaid purchase money.*

SALE I.

Sale of personal property. (A) *Warranty.* (C) *Rule of damages for breach of the contract.* (D) *When the property vests.*

(A) *Warranty.*

1. Upon a sale with a warranty of soundness, or where by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and the contract being thereby rescinded, it is a defence to an action for the purchase money brought by the vendor, and will entitle the vendee to recover it back if it has been paid. *Thornton v. Wynn*, 12 *Wheat*. 183.

2. So, if the sale is absolute, and the vendor afterwards consents unconditionally to take back the article, the consequences are the same. *Id.*

3. But if the sale be absolute, and there be no subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time. *Id.*

4. In a contract for the sale of articles without warranty on the part of the seller, if there be no fraud on the part of the seller, he is not answerable for the quality of the articles. *Willings v. Consequa*, 1 *Peters' C. C. R.* 302.

5. If the vendor warrants the quality of the articles he sells, he is bound to deliver them of the stipulated quality, and the examination and approbation of some of the articles by the vendee, when they are delivered, does not amount to a waiver of the contract. *Id.*

6. If the vendee cannot examine the articles, but purchases them from an examination of samples, there is an implied warranty on the part of the seller, that the articles shall correspond with the samples. But, an examination of samples, when there is an express warranty, is not a waiver of the warranty. *Id.*

7. An advertisement of goods for sale, stating them to be of a superior quality, when in fact they were of inferior quality, did not amount to a warranty, inasmuch as the defendants relied upon their own personal inspection. *Calhoun v. Vecchio*, 3 *Wash. C. C.* 165.

8. Upon a Canton contract to deliver teas, the quality of the sample chests to be selected by A; if A select and accept of chests of an inferior quality, in performance of the contract, there is an end to the warranty; and the Hong merchant could only be liable for a fraud, in imposing on the defendant teas apparently of a particular quality, but actually inferior. He could not be bound to deliver the selected teas, which might be very inferior, and bound also to deliver teas of a better quality. *Cheongwo v. Jones*, 3 *Wash. C. C. R.* 359.

9. If the teas selected by A, were afterwards changed, the buyer was at liberty to rescind the contract, and refuse to take the teas, as soon as the fraud was discovered—even at Amsterdam, the place of their sale, and to recover back what had been paid; and also to refuse payment of the note given on the contract, on the ground of a failure in the consideration of the note; or he might affirm the contract, and claim damages. *Id.*

(C) *Rule of damages for breach of the contract.*

10. In an action at law by the vendee, against the vendor, for a breach of the contract, in not delivering the thing sold, the proper measure of damages is not the price stipulated in the contract, but the value at the time of the breach. *Hopkins v. Lee*, 6 *Wheat.* 109.

11. This rule applies to the sale of *real* as well as *personal* property; but, *Quære*, whether it is the proper measure of damages in the case of an action for eviction? *Id.*

12. The sales at Amsterdam, of teas shipped at Canton under a contract that they should be prime teas, compared with the sales of similar teas there, furnish the *rate of loss*, which, in ascertaining the damages sustained by the breach of a contract, is to be applied to the first cost of the teas so shipped at Canton; but those sales do not furnish the amount of the damages. *Gilpins v. Consequa*, 1 *Peters'* C. C. R. 86. S. C. 3 *Wash.* C. C. R. 185. *Willings v. Consequa*, 1 *Peters'* C. C. R. 172. *Tongva v. Nizam*, 1 *Peters'* C. C. R. 221. *Dusar v. Murgatroyd*, 1 *Wash.* C. C. R. 13.

13. No damages are to be allowed for any profit or gain the plaintiff might have obtained by exchange or otherwise. *Id.*

(D) *When the property vests.*

14. The right of a vendor in cases of insolvency to stop goods for non-payment of the purchase money, is confined to cases where the goods are still *in transitu* to the vendee. *Conyers v. Ennis*, 2 *Mason*, 236.

15. Where goods were sold, lying in the vendor's warehouse, on a credit of six months, for which a note was given, and the goods were sold by marks and numbers, and it was a part of the consideration of the purchase, that they might lie, rent free, in the warehouse, at the option of the vendee, and for his benefit, until the vendor should want the room; held, that there was a complete delivery of the goods, so that, on the insolvency of the vendee, they could not be stopped by the vendor. *Barrett v. Goddard*, 3 *Mason*, 107.

16. A delivered cotton yarn to B, on a contract that the same should be manufactured into plaids; B was to find the filling, and was to weave so many yards of the plaids at fifteen cents per yard as was equal to the value of the yarn at sixty-five cents per pound. Held, that by delivery of the yarn to B the property thereof vested on him. *Buffum v. Merry*, 3 *Mason*, 478.

17. A purchase was made of 198 boxes of sugar, for which certain acceptances, drawn by the purchaser, and endorsed and accepted for his accommodation, were to be given to secure payment. The sugars were to be shipped on board of a ship belonging to the purchaser, then lying in the same port and bound on a foreign voyage. The acceptances were to be delivered upon the return of the purchaser from Boston, to which place he was going. While at Boston he failed, and assigned his property. During his absence a part of the sugars were put on board of the ship. After his return he kept his own failure a secret, and also the failure of his endorsers and acceptor, and procured a delivery of the residue of the sugars, on the faith that the acceptances were to be duly given. Held, that if the delivery of sugars, under these circumstances, was not intended by the parties to be an absolute delivery, but delivery on condition only, that the terms of the contract were complied with, then the vendor might reclaim the sugars, and his property in them was not gone. It was further held, that if the delivery of the sugar after the failure, was procured by a fraudulent suppression of that fact, the delivery, as to that portion, was altogether without any legal validity; whatever might be the case as to the other parcels. *D'Wolf v. Habbett*, 4 *Mason*, 289.

18. Where goods are sold while at sea, the vendee acquires, without actual possession, a constructive possession, sufficient to maintain trespass against any wrong-doer. *Howland v. Harris*, 4 *Mason*, 497.

19. When goods are imported in a ship, after such sale, and before they are unladen, an inspector is put on board:—His custody thereof, to secure the lien of the United States for duties, is not a divestment of the title and possession of the vendee as against a wrong-doer. *Id.*

20. The endorsement and delivery of a bill of lading, or the delivery of the bill without endorsement, if the cargo is, by the terms of it, to be delivered to a particular person, amounts to a transfer of the property, subject to the right of the vendor, if the consideration be not paid, to reclaim the property before it shall get into the actual possession of the vendee. *Walter v. Ross*, 2 Wash. C. C. R. 283. *Ryberg v. Snell*, 2 Wash. C. C. R. 403.

21. If the factor sell the goods, to a *bona fide* purchaser, for a valuable consideration, by assignment of the bill of lading, the right of the principal to stop *in transitu* is defeated, because, in such case the goods had been sold by authority of the real owner. *Id.* 283. 403.

SALE II.

Sale of real property. (A) *Sale of land at auction.* (C) *Lien of vendor for unpaid purchase money.*

(A) *Sale of land at auction.*

22. Question as to the sufficiency of a notice of sale of real property under a deed of trust. *Newman v. Jackson*, 12 Wheat. 571.

23. No particular form of such a notice is prescribed by law; it is sufficient if the description of the land is reasonably certain, so as to inform the public of the property to be sold. *Id.*

(C) *Lien of vendor for unpaid purchase money.*

24. The vendor of real property, who has not taken a separate security for the purchase money, has a lien for it, on the land, as against the vendee and his heirs. *Bailey v. Greenleaf*, 7 Wheat. 48.

25. This lien is defeated by an alienation to a *bona fide* purchaser without notice. *Id.*

26. Nor can it be asserted against creditors holding under a *bona fide* conveyance from the vendee. *Id.*

27. *Quare*, Whether the lien can be asserted against the assignees of a bankrupt, or other creditors coming in under the purchaser by act of law? *Id.*

28. Generally speaking, a lien on land for the unpaid purchase money exists, as between vendor and vendee, and also as against subsequent purchasers from the vendee with notice that the money remains unpaid; but not as against a purchaser *bona fide* without notice. *Gilman v. Brown*, 1 Mason, 192.

29. But the rule itself is not inflexible, as between vendor and vendee. And therefore if the parties do any unequivocal act, by which they clearly show that they do not contemplate such a lien to exist, the lien is not permitted to attach. *Id.*

30. If the vendor take a distinct security for the money, either of property or of the responsibility of a third person, the lien is waived. *Id.*

31. But merely taking the note or bond of the vendee himself, without a surety, is no waiver of the lien. *Id.*

32. If the vendor take a negotiable note of the vendee, endorsed by a third person, payable at future times by instalments, this is such a distinct security as extinguishes the lien. *Id.*

33. *Quare*, Whether on a purchase of lands, lying in another State, made under a contract executed in Massachusetts by citizens of that State, a lien for the pur-

chase money vests in favour of the vendors, who are citizens of the State where the lands lie, the contract being silent on that head, and no such lien existing by law in any case of the purchase of lands in Massachusetts. *Id.*

34. A lien is always supposed to exist by the tacit consent of all parties. Can such consent be presumed, where the law of the State is not known to the purchasers in another State? *Id.*

35. A lien is neither a *jus ad rem*, nor a *jus in re*; and the lien of a vendor on the land sold is so mere a creature of the Court of Equity, that its existence cannot be safely predicated in any case, until established by the decree of the Court. *Id.*

SALVAGE.

1. The amount of salvage rests in the sound discretion of the Court. In general it ought not to be less than one third, unless the property be very valuable, or the services very inconsiderable. *Tyson v. Prior*, 1 *Gallis*. 133. *Bond v. The Cora*, 2 *Wash. C. C. R.* 80. *Warder v. Goods, &c.* 1 *Peters' Adm. Decis.* 31. *Clayton v. The Harmony*, *Id.* 70. *Small v. Goods, &c.* 2 *Peters' Adm. Decis.* 284.

2. A case of derelict can occur only where the property has been abandoned without the hope or intention of recovery. *Id.* *Warder v. Goods, &c.*, 1 *Peters' Adm. Decis.* 35. *Taylor v. The Cato*, 1 *Peters' Adm. Decis.* 52.

3. In general a moiety is the rule of salvage in cases of derelict; but it is a flexible rule, yielding to circumstances. *The Brig ———*, 1 *Mason*, 372. *Hindry v. The Priscilla, Bee*, 1.

4. The salvage paid to seamen in cases of shipwreck is a charge on the property saved, and to be borne by the underwriters, if the ship is abandoned to them. *The Two Catherinees*, 2 *Mason*, 319.

5. The owner, and not the freighter, is entitled to salvage, unless being on board at the time the property was saved, he consented to the same, and thus discharged the owner of the vessel from the responsibility incurred by deviating to save the property. *Bond v. The Cora*, 2 *Wash. C. C. R.* 80, S. C. 2 *Peters' Adm. Decis.* 361.

6. A passenger who assisted in saving the property, is entitled to a portion of the salvage. *Id.*

7. A vessel was found on shore on the Bahama bank, deserted by her crew, and by very great exertion and danger, she was brought into New-York. One half of the neat proceeds of vessel and cargo were allowed as salvage. *Concklin v. The Harmony*, 1 *Peters' Adm. Decis.* 34. *Et vide Morehouse v. The Jefferson*, 1 *Peters' Adm. Decis.* 46. *Bell v. The Ann*, 2 *Peters' Adm. Decis.* 278.

8. Both ship and cargo, or such parts as are saved, are alike responsible for salvage. *Taylor v. The Cato*, 1 *Peters' Adm. Decis.* 58. *Weeks v. The Catharina Maria*, 2 *Peters' Adm. Decis.* 424.

9. Where an American vessel was captured by a French corvette, part of her crew taken out and ordered to Rochelle, and the mate, steward, and cook, with the assistance of two male and two female passengers, rose on the prize master and his crew, ten in number, overpowered them, and brought the vessel into Philadelphia; one fourth of the whole value of ship and cargo was allowed as salvage. *Clayton v. The Harmony*, 1 *Peters' Adm. Decis.* 70. *Et vide Brevoort v. The Fair American*, 1 *Peters' Adm. Decis.* 87.

10. The owner has the election to take the thing saved or not. If he refuses, the thing only is answerable for salvage. But if he receives the goods, though the lien in the article may be gone, and especially if it passes to a third person, yet the

right to salvage continues. It becomes a personal claim, founded on the transaction at sea, and must be prosecuted *in personam*, in the Admiralty. *Brewer v. The Fair American*, 1 *Peters' Adm. Decis.* 94.

11. There is no precedent of a suit in a Common Law Court, for salvage on the high seas. *Id.*

12. No salvage can be allowed, further than on the amount of goods sold and delivered. *Id.*

13. Where an American, which had been condemned by an unauthorized foreign tribunal, purchased by the libellant, and brought into the port of Philadelphia, was ordered by the District Court to be restored, the Court refused to allow salvage to the libellant. *Coulon v. The Neptune*, 2 *Peters' Adm. Decis.* 356.

14. Mariners are entitled to wages when goods have been saved and brought into port; and wages were allowed up to the time of the delivery of the goods saved into the custody of the marshal. *Weeks v. The Catharina Maria*, 2 *Peters' Adm. Decis.* 424.

15. No length of time shall divest the original owner of property found derelict at sea. It will be restored upon payment of salvage according to circumstances; unless there be proof of an intention to abandon wholly. *Willie v. The St. Petre*, *Bee*, 82.

16. Vessels met with in distress, at sea, and brought into the port of a neutral power, must be restored, after payment of salvage to those who were in possession of her when she was met with. *Booth v. The L'Esperanza*, *Bee*, 93.

17. Salvage must always be a reasonable allowance, to be fixed by the Court upon consideration of the circumstances. All agreements, therefore, entered into in situations of distress at sea, are contrary to law, and will be set aside. *Schutz v. The Mary*, *Bee*, 139. *Cowell v. The Brothers*, *Bee*, 136.

18. A schooner being lost in transporting articles saved from a wrecked vessel, after they had been placed in a state of safety, the owner is not entitled to compensation. *Stephens v. The Argus*, *Bee*, 170.

19. Restitution upon payment of salvage will be adjudged in all cases, if the original owners can be found. *British Consul v. Smith*, *Bee*, 178.

20. Whatever may be the service rendered, the Court never give more than half by way of salvage; and will restore the remainder to the owners. *Cross v. The Bellona*, *Bee*, 139.

21. A vessel with slaves on board, but no white person, was considered as derelict, and one third given as salvage, and the captain and owner's share thereof was declared forfeited for fraudulent concealment of two of the negroes. Such share enures to the owners of the derelict. *Flinn v. Leander*, *Bee*, 260.

SET-OFF.

1. In an action for damages for negligence in keeping the plaintiff's sheep, founded on the breach of a special contract, the defendant will not be permitted to deduct from the damages the compensation which he claims for keeping the sheep. Such compensation, if any be due, must be sought in a distinct action. *Crowninshield v. Robinson*, 1 *Mason*, 93.

2. In general, the doctrine of set-off is the same in equity as at law. *Jackson v. Robinson*, 3 *Mason*, 138.

3. Joint debts cannot be set-off in equity any more than at law against separate debts, unless there be some other equitable circumstances. *Id.*

4. *Quære*, Whether the United States are bound by a statute of set-off of the State in which the suit is brought? *Barker v. United States*, 1 *Paine*, 156.

5. The fourth section of the "act for the more effectual settlement of accounts between the United States and receivers of public money," embraces suits between the United States and any individual, whatever may be the cause of action. *Id.*

6. A set-off, therefore, in a suit by the United States on a bill of exchange against a private individual, where the course required by this act had not been pursued, was rejected. *Id.*

7. *Quere*, Whether the debt of one partner, in a joint concern with others, not yet closed, can be set-off in an action by one partner against the other? *Hurst v. Hurst*, 1 Wash. C. C. R. 56.

8. The defendant in an action on a bill of exchange, may set-off a claim he has upon the plaintiff, for not having insured a particular sum on a vessel, and which he was ordered and bound to do, the vessel having been lost, and no insurance made by the plaintiff. *De Taslett v. Croussillat*, 1 Wash. C. C. R. 504.

9. Unliquidated damages cannot be set off. *De Taslett v. Croussillat*, 2 Wash. C. C. R. 182. *U. States v. Wells*, 2 Wash. C. C. R. 161.

10. An independent debt, not included in an account stated, may be set off in an action on the stated account. *Vuyton v. Breuil*, 1 Wash. C. C. R. 467.

SHIPPING.

I. *Charter-party.*

II. *Bottomry and respondentia bonds.*

III. *Master and mariners.*

SHIPPING I.

Charter-party.

1. By a charter-party, the sum of 30,000 dollars was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and, at the option of the charterer, to Calcutta, and back to Philadelphia, (with an addition of 2000 dollars, if she should proceed to Calcutta,) the whole payable on the return of the ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of 90 days from the time at which she should be ready to discharge her cargo. The charterer proceeded in the ship to Calcutta, and, with the consent of the master, (who was appointed by the ship owners,) entered into an agreement with P. & Co. merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading, stipulating for the delivery of the goods purchased therewith, to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on G. & S., of Philadelphia, should be accepted; in which event, the agents of P. & Co. should deliver the goods to the charterer. The goods were shipped accordingly, and a bill of lading signed by the master, with the clause, "freight for the said goods having been settled here." The bills of exchange, drawn by the charterer, were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver, without the payment of the freight: *Held*, that the owners of the ship had a lien on these goods for the freight. *Gracie v. Palmer*, 8 Wheat. 605.

2. If there be a covenant to proceed to a foreign port, and take in a cargo, and return therewith to the United States, for a stipulated hire, and the ship go to the foreign port, and the charterer decline to put any cargo on board, the owner is not bound to come home empty, but may engage in another voyage, and take another cargo, on freight, for the United States, and the freight so earned cannot be claimed by the charterer. *Kleine v. Catara*, 2 Gallis. 61.

3. Where the whole consideration for any stipulation fails, or it becomes incapable of being performed substantially as the parties intended, by the voluntary act of one of the parties, the other is not bound to proceed. *Id.*

4. If, by the terms of the charter-party, the ship is to be navigated at the charge and expense of the owner, and especially if the whole tonnage of the ship is not let to hire, the charterer is not owner for the voyage. *Id.*

5. If the charterer fail to load the ship, he is liable to pay the same freight, in case she returns empty, as would have been earned if he had complied with his covenant. *Id.*

6. One chartered the hold of a vessel for a voyage, covenanting to pay freight, the owner appointing and paying the master and crew, and fitting the vessel. A third person shipped goods, consigning them to the defendant, who, on receiving them from the master, promised to pay the freight. Held, that the charter-party did not deprive the owner of his lien for the freight, and that the defendant became liable to the owner for the freight by his acceptance of the goods. *Ruggles v. Bucknor*, 1 Paine, 358.

7. Whether the owner has a lien under any circumstances on a part of the cargo not delivered, for the freight of the whole. *Id.*

8. The owner of a ship is not liable for barratry of captain and crew, beyond the sum mentioned in the charter-party; nor to repairs of the ship, if warranted by the owner to be *kept staunch* during the voyage. But in case of loss or expense by necessary deviation, both vessel and cargo must contribute in general average. *Campbell v. The Alknomac*, Bee, 124.

SHIPPING II.

Bottomry and respondentia bonds.

9. It is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. *Conard v. Atlantic Ins. Co.* 1 Peters, 437.

10. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. *Id.* 437.

11. The lender is not presumed to lend upon the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run upon other goods, and it was not a mere contract of wager and hazard. *Id.*

12. Where a bottomry bond is given upon *vessel* and *freight*, it binds *them only*, and not the cargo, although in a recital in the bond it is stated, that the master was necessitated to take the sum loaned on the *vessel*, her *cargo*, and *freight*. *The Zephyr*, 3 Mason, 341.

13. If the omission were by mistake, and so stated in the libel, it might be reformed. *Id.*

14. Where a bottomry bond was given, payable within five days after the arrival of the vessel at Boston, and a bill of exchange was drawn for the amount loaned, at the same time, payable in London, and the agreement was, that if the bill was paid, the bottomry bond should be void, at the option of the borrower, and the borrower does not elect to pay the bill, the lender cannot, in a suit on the bottomry bond, recover the exchange between Boston and London, but must receive the amount of his bottomry bond. *Id.*

15. When *freight* is pledged in a bottomry bond, it means the *freight* of the whole voyage, and not the freight for that part of the voyage unperformed at the time of giving the bond. *Id.*

16. The decree in bottomry is, to consider the sum lent and the premium, as a principal, and to allow common interest on that sum for the delay of payment after it is due. *The ship Packet*, 8 *Mason*, 255.

17. In a suit *in rem* on a bottomry bond, underwriters, to whom an abandonment is made, which has not been accepted, are not admissible as claimants. *Id.*

18. In case of necessary repairs, the master may sell part of the cargo or hypothecate it. *Id.*

19. If he has money on board belonging to the shippers, he is not bound to apply it to the ship's necessities before borrowing on bottomry, at least if not equal to the amount of repairs: But the law invests him with a large discretion on the subject. *Id.*

20. If he has sufficient money of the owners, he cannot borrow on bottomry; so, it seems, if he have of his own, on board. *Id.*

21. Courts of Admiralty will marshal the assets in case of bottomry, so as to make the proper priorities in favour of shippers, against the property of the owner and master. *Id.*

22. The Court may, if the premium is inflated by extortion, moderate it. *Id.*

23. A bottomry bond may be good in part, and bad in part; and will be sustained by the Court so far as it is good. *Id.*

24. In a respondentia bond for \$10,000 on goods on board of the brig *S.* from Boston to St. Petersburg and back, there was a clause that the brig was to have on board, on both passages, the amount lent, in goods. There was also a memorandum executed at the same time, but not referred to in the bond, that the bills of lading should be endorsed to the lenders as collateral security. The brig was lost upon the return voyage, having goods on board of the value of \$9000 only. The lenders sued the bond and claimed payment of the \$10,000, because the full amount of goods was not on board, and because the bills of lading were not endorsed to the lenders. It was held, that these acts were not conditions precedent, the omission of which were sufficient to justify a recovery *in toto*; but the lenders were entitled to recover the difference in amount between the sum lent and the sum on board at the time of the loss. *Franklin Ins. Co. v. Lord*, 4 *Mason*, 248.

25. The risk of the lender and his right to re-payment only on the safe arrival of the vessel, constitute the essential difference between a bottomry and simple loan. *The sloop Mary*, 1 *Paine*, 671.

26. Marine interest is also requisite to a bottomry loan, but if not expressed in the bond, it will be presumed to have been included with the principal. *Id.*

27. The jurisdiction of Courts of Admiralty over contracts depends principally upon their subject matter; and in cases of bottomry, it is not the absolute necessity of the loan that gives the jurisdiction. *Id.*

28. And the owner as well as the master of a vessel may pledge her by bottomry in a foreign port. *Id.*

29. The master of a vessel in a foreign port, acting in the character of agent, is limited in his power, and can only pledge the vessel in case of necessity; but the owner, having an absolute control over his property, may pledge her for money to purchase a cargo, and thereby create an Admiralty lien. *Id.*

30. In November, 1822, the owner of a vessel in Connecticut, gave a bill of sale of her in the nature of a mortgage, but was suffered to remain in possession and act as absolute owner, and her register and all her papers remained unaltered. In July following, he gave a bottomry bond for money advanced to purchase a cargo for the vessel in the West Indies, without notice to the lender of the mortgage: Held, that upon Common Law principles, the claim of the lender was to be preferred to that of the mortgagee. *Id.*

31. To make a hypothecation bond, executed by the master of a vessel, valid; the necessity of raising the funds advanced upon it, by such means, must be shown. *The Lavinia*, 1 *Wash. C. C. R.* 49. *Rucher v. Conyngham*, 2 *Peters' Adm. Decis.* 295.

32. If one of the owners of the vessel reside at the port where the bond is given, it is not good. *Id.*

33. The consignee of a vessel is bound to advance the freight, for the supply of the necessities of the voyage, to be so applied by the master. *Id.*

34. While the freight is in the hands of the consignee, he cannot advance money to the master on marine interest, unless he has been directed by the consignor to appropriate the freight to another purpose. *Id.*

35. An instrument, claimed to be an hypothecation of a vessel, is not such, if it was given to the consignee, when he had funds in his hands to secure the advances made by him for the vessel. *The John and Alice*, 1 Wash. C. C. R. 293. *Hurry v. Hurry*, 2 Wash. 148.

36. The master cannot hypothecate for a pre-existing debt; but only for advances for a purpose necessary to enable him to complete his voyage, made at the time the necessity existed. *Id. Hurry v. Hurry*, 2 Wash. 148.

37. A bond executed as an hypothecation, but not upon the principles which govern such securities, cannot be enforced in a Court of Admiralty; but must be proceeded upon in a Court of Common Law. *Id.*

38. The obligee in a bottomry bond ought always to prove the necessity for the advances, and that they were made to enable the master to prosecute his voyage; the necessity for such advances, and that they were made on the credit of the vessel, are never to be presumed. If the master has or can command other funds, he has no authority to subject the property of the owner to the payment of a premium beyond legal interest. *Walden v. Chamberlain*, 3 Wash. C. C. R. 290.

39. Another conclusive objection to the validity of this bond, is, that before the advance was made and the bond given, the master had resigned his command of the vessel, and another master, appointed by the libellant, had succeeded to it. *Id.*

40. The master of an American vessel, in an enemy's country, may hypothecate the vessel, for money advanced to return to the United States; though the original voyage was broken up by capture and the compulsory sale of the cargo. *Crawford v. The William Penn*, 3 Wash. C. C. R. 485.

41. In a libel on a bottomry bond, the libellant is always expected to prove, by other evidence than the bond, that the money was lent, and that the repairs were made, and materials were furnished, to the amount claimed, and that they were necessary to enable the vessel to perform the voyage, or for her safety; and that the money could not otherwise be obtained. He should exhibit an account of the items, for which the funds were expended, with the usual proof, that the Court may judge of their necessity. *Id.*

42. The lender on bottomry must inform himself whether the alleged necessity exists. If not, he loses his specific lien on the vessel. *Putnam v. The Polly*, *Bee*, 157.

43. A ship cannot be hypothecated according to the maritime law, before the voyage is begun, or in places where the owners reside, even for those necessities without which the vessel cannot proceed to sea. *Turnbull v. The Enterprize*, *Bee*, 345.

44. Bottomry bonds may be given for security of mercantile or other debts, either in places where the owners dwell, or in foreign places, by their order. *Forbes v. The Hannah*, *Bee*, 348.

Et vide post, SHIPPING III.

SHIPPING III.

Master and Mariner.

45. The act of 20th July, 1790, ch. 29, regulating seamen in the merchant's service, does not apply to foreign seamen on board of foreign ships. *Ex-parte D'Oliveira*, 1 Gallis. 474.

46. The master's contracts for supplies and repairs create an hypothecation, by the general maritime law. *Quære*, how far this is controlled as to domestic ships. *The Jerusalem*, 2 *Gallis*. 345.

47. Where the crew of a privateer engaged to remain on board three months from the time of sailing, unless the cruise should be sooner completed in the opinion of the owners; and the three months having expired, while the privateer lay refitting in a port of France, thereupon new articles were signed for a second cruise; it was held, that the first cruise continued until the return of the vessel to the United States—and that assignees of shares in the original cruise, and the officers and crews, who were put on board of prizes on the outward voyage, and did not rejoin the privateer, were entitled to share in prizes made on the homeward voyage. *The Brutus*, 2 *Gallis*. 526.

48. A cruise, *ex vi termini*, imports a definite place, as well as time, of beginning and ending, unless there be something in the articles expressly to control that construction. When not otherwise specially agreed, a cruise begins and ends in the country, to which the ship belongs. *Id.*

49. *Quære*, Whether it comprehends a return to the home port of the vessel. *Id.* 540.

50. A cruise for three months means, that three months only shall be employed in cruising, and not that the engagement for the cruise is then, to all intents and purposes, to terminate. *Id.* 545.

51. A cruise, like a voyage, begins in legal contemplation, when the ship breaks ground for the purpose of sailing. *Id.* 541.

52. When the term of time once begins to run, it is not suspended by any intermediate accident or casualty happening in the course of the cruise. *Id.* 542.

53. The commander of a privateer has no implied authority to break up the cruise, and to institute a new cruise. *Id.* 548.

54. If a mariner, shipped for a cruise, be disabled and leave the privateer, by common consent, before the cruise has commenced, he is not entitled to a share of prizes. *Ex parte Giddings*, 2 *Gallis*. 56.

55. *Aliter*, if he were disabled, during the cruise, and in such case, on board of a merchant ship, he would be entitled to his full wages during the voyage. *Id.*

56. The contract for mariners' wages is not dissolved by a capture, unless followed by condemnation. During the prize proceedings it is suspended, and by restitution or recapture, the parties are remitted to their former rights. *The Saratoga*, 2 *Gallis*. 164. 176. [*Willard v. Dorr*, 3 *Mason*, 91.]

57. Seamen, after a capture, have a right to remain by the ship. *Quære*, At what time they may lawfully quit the ship? *Id.* [*Emerson v. Howland*, 1 *Mason*, 50.]

58. If, pending the voyage, there be an interdiction of commerce with the port of destination, by war or otherwise and in consequence the voyage is broken up, no wages are due. But if the mariners be subsequently retained by the master to refit and repair the ship, they are entitled to a reasonable compensation in the nature of wages. And if afterwards discharged in a foreign port, the mariners are entitled to two months pay, provided by the act (28th Feb. 1803) and may recover it, if unpaid, by a suit in the Admiralty. *Id.*

59. There are some exceptions to the rule, that, to entitle to wages, freight must be earned. If the voyage or freight be lost by the negligence, fraud, or misconduct, of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage; in all these cases, the mariners are entitled to wages, notwithstanding no freight has accrued. *Id.*

60. The general doctrine is, that mariners do not contribute to general average. The only admitted exception is in case of ransom, and perhaps, by parity of reasoning, of recapture. *Id.*

61. A mariner shipped on a voyage to the "Pacific, Indian, and Chinese oceans, or elsewhere, on a trading voyage, and from thence back to Boston," with a stipulation that two months' wages should be paid on arrival at Canton, the voyage being in fact a trading voyage to the northwest coast for furs; it was *held*, that the outward voyage terminated at Canton, and that the shipping articles did not authorize return from Canton to the northwest coast, and that, therefore, it was not a desertion in a mariner to leave the ship at Canton, it being the intention of the master to return to the coast. *Brown v. Jones, 2 Gallis, 477.*

62. It seems, that a "trading voyage" does not include a "freighting voyage." *Id.*

63. The words "or elsewhere," in the shipping articles, are either void for uncertainty, under the act of Congress regulating mariners in the merchants' service, or are to be construed as subordinate to the principal voyage stated in the articles. *Id.*

64. Though a "trading" and not a "freighting" voyage, is described in the articles, yet the taking on board of goods on "freight," is not a deviation, to discharge the seamen, if it occasion no unnecessary or unusual delay; but the seamen, in such case, are not bound to remain by the ship for the purpose of unlading the freighted cargo. *Id. 482.*

65. Where seamen are discharged abroad without the payment of the three months wages required by the act of Congress of 28th February, 1803, ch. 62, on a libel for wages, the Court will enforce the payment of the three months wages. *Emerson v. Howland, 1 Mason, 45.*

66. Where an embezzlement takes place on board of a ship, the seamen are not liable to contribute out of their wages, unless it was caused by fraud, connivance, or negligence; or, if the offender is unknown, unless a presumption of guilt is fixed upon all the crew, or at least on those who are called upon to contribute. *Spurr v. Pearson, 1 Mason, 104.*

67. One seaman may be a witness for another in any suit respecting the same voyage, although interested in the question, if not interested in the event of the suit. *Id.*

68. If the master of the ship, after the commencement of the voyage, be by sickness disabled from pursuing it, and a new master is appointed, the shipping contract with the seamen is not dissolved thereby. *United States v. Hamilton, 1 Mason, 443.*

69. A voyage in shipping articles from A to B, or some other port for a cargo of salt, and return to the United States, is not ended on arrival at the first port of the United States, unless it be the port of discharge. *United States v. Smith, 1 Mason, 147.*

70. A master of a ship loaded on freight, and having no consignment of the cargo, has no right to pledge or sell any part of the cargo at an intermediate port, short of the port of destination, except for necessary repairs and expenses to enable him to perform the voyage. If he break up the voyage at an intermediate point, he has no authority to sell any part of the cargo to pay for advances to him to repair the ship for a new voyage, or to pay seamen's wages. *Watt v. Potter, 2 Mason, 77.*

71. If property is put up at auction by a master of a ship as agent of his owners, and bid in by him to prevent a loss, it is in contemplation of law no sale of the property. *Barker v. Marine Ins. Co. 2 Mason, 369.*

72. A master of a ship cannot become a purchaser at a sale of the property, which is sold by his authority as agent of the owners. *Barker v. Marine Ins. Co. 2 Mason, 369.*

73. A master of a ship who sells a cargo at public auction, after an abandonment to the underwriters, and buys it in at the sale to prevent a loss, does not become owner of the property thereby, so as to acquire thereby an insurable interest. *Id.*

74. Seamen's wages on an illegal voyage are no lien on the vessel. *The Langdon Cheves, 2 Mason, 58.*

75. The contract of the seamen is not dissolved by shipwreck; but they are bound to labour to preserve the wreck of ship and cargo; and if they leave the ship

without endeavouring to save them, they desert their duty, and may forfeit wages antecedently due. *The Two Catherinees*, 2 Mason, 319.

76. A ship sailed on a voyage from *Newport* to *Gibraltar*, and there landed her cargo and went in ballast to *Ivica* for a cargo of salt, and after taking it on board, proceeded on her homeward voyage for *Providence*, and was wrecked on an island in *Narragansett Bay*, and the cargo totally lost, but the ship's tackle, &c. were saved. *Held*, 1. That the seamen were entitled to wages up to the arrival of the ship in *Ivica*, and half the time she stayed there. 2. That they were not entitled to wages for the homeward voyage, because no freight was earned. 3. But that the seamen were entitled to salvage for saving the materials of the ship, and, under the circumstances, a salvage was allowed equal to the amount of their wages for the homeward voyage. *Id.*

77. The expenses of curing a sick seamen in the course of the voyage is a charge on the ship by the maritime law; and in this charge are included not only medicine and medical advice, but nursing, diet, and lodging, if the seamen be carried ashore. *Harden v. Gordon*, 2 Mason, 541.

78. The act of Congress for the regulation of seamen, &c. (20 July, 1790, ch. 29, s. 8,) has not changed the maritime law, except so far as respects medicines and medical advice, when there is a proper medicine chest and medical directions on board the vessel. The charges of nursing and lodging are not affected by the act. *Id.*

79. The Court of Admiralty has jurisdiction to enforce the payment of charges for the nursing and lodging of seamen by a libel, for they are in the nature of additional wages during sickness. *Id.*

80. A stipulation, that the seamen shall pay for medical advice and medicines, without any condition, that there shall be a suitable medicine chest, &c. is void, as contrary to the policy of the act of Congress. *Id.*

81. *It seems* that no stipulation contrary to the maritime law to the injury of seamen will be allowed to stand, unless an adequate additional compensation be given to them. *Id.*

82. A receipt in full of all demands is open to inquiry and explanation. A settled account for wages, &c. is not conclusive; but it may be surcharged and falsified. *Id.* *Whitman v. The Neptune*, 1 *Peters' Adm. Decis.* 180. *Thorne v. White*, 1 *Peters' Adm. Decis.* 177. *Jackson v. White*. *Id.* 179.

83. The *onus probandi* in respect to the sufficiency of the medicine chest lies on the owner. *Harden v. Gordon*, 2 Mason, 541.

84. The master of a ship has a lien on the *freight* for all advances made abroad for the ship's use. *Quære* if not also on the *ship*? *The ship Packet*, 3 Mason, 255.

85. The master of a neutral ship which is captured is bound to remain by the ship until condemnation, or until a recovery is hopeless; and his wages after the capture and until the condemnation, &c. are a charge to be paid by the owners, and ultimately to be borne, as a general average, by all the parties in interest. *Willard v. Dorr*, 3 Mason, 161.

86. If the master is guilty of smuggling in the voyage, if it is gross it is a forfeiture of his wages for the voyage; and at all events any loss to the owner occasioned thereby, is to be compensated out of the wages of the master. *Id.*

87. Where seamen had forfeited their wages by misconduct in the voyage, and afterwards earned wages, the Court *held*, 1st, that the advance wages, stipulated in the shipping articles, should be a charge on the *forfeited* wages. 2d, that money advanced on the voyage for clothes, &c. and not stipulated for, should be a charge on the unforfeited wages. 3d, that hospital money should be apportioned *pro rata* on the wages of the whole voyage. *The Mentor*, 4 Mason, 102.

88. Wages of seamen are forfeited for gross offences; but not for slight faults, either of neglect or disobedience. There must be either an habitual neglect or disobedience, or a single act of a heinous and aggravated nature. *The Mentor*, 4 Mason, 84.

89. Repentance and tender of amends reinstate the claim for wages. *Id. Whitton v. The Commercen*, 1 *Peters' Adm. Decis.* 160.

90. If the articles prohibit any traffic by the seamen under forfeiture of wages, yet the master may remit the forfeiture. *The Mentor*, 4 *Mason*, 84.

91. A master has power to remit a forfeiture; and his pardon is a redintegration of the seamen in the right of wages. *Id.*

92. A master has no right to degrade the ship's carpenter without sufficient cause. *Id.*

93. Wages forfeited for an offence are only such as are earned antecedently, and not subsequently to the offence. *Id.*

94. Where an American seamen is discharged by the master in a foreign port, he may recover, in a libel for wages, the three months advance, authorized by the act of Congress of 1803, ch. 62, if the same be not paid to the consul abroad, to be distributed according to the act. The *onus probandi* is in the master to show, that the advance was paid. *Orne v. Townsend*, 4 *Mason*, 541.

95. Habitual drunkenness, if it goes to establish general incapacity to perform duty, is a ground of forfeiture of wages; otherwise it goes only to diminish compensation for the voyage. But no fact of this nature is examinable at the hearing, unless averred and put in issue by the owner. *Orne v. Townsend*, 4 *Mason*, 541.

96. Where misconduct is relied on to defeat the claim of wages, it should be stated with reasonable certainty as to time, place, circumstances, and degree. *Id.*

97. It is no objection to the recovery, of the three months advance, that the name of the seamen is omitted, as an American citizen, in the list of the crew, certified from the Collector's office, under the act of 1796, ch. 36, s. 4, if he is named as an American citizen on the master's list of the crew. *Id.*

98. A refusal to do duty, at a moment of high excitement from punishment inflicted on the party, if not followed by obstinate perseverance, is not a forfeiture of wages. *Id.*

99. The mate is entitled to command in the absence of the master, and if a seaman be wrongfully dismissed by him, the owners are liable therefor, as the act of their agent. *Id.*

100. Seamen, forcibly put on shore by the captors, from a vessel, which was afterwards ransomed, and arrived at her port of destination, navigated from the place of capture, by a new crew, the owners not having given the original crew an opportunity to rejoin the vessel; are entitled to wages subject to a contribution for the ransom. *Girard v. Ware*, 1 *Peters' C. C. R.* 142.

101. When a vessel is lost on her homeward voyage, full wages are due to the seamen up to the time of her arrival at the last port of delivery, of the outward cargo; and half wages from that time until her departure from the last port at which the return cargo was taken on board; the time of her going from port to port to obtain the cargo, being considered the same as if she had remained at her port of delivery, and taken a full cargo there. *Thompson v. Faussatt*, 1 *Peters' C. C. R.* 182.

102. Retaining seamen on board, by direction of the owner, after the determination of the voyage for which they shipped, amounts to a new contract for the return voyage, upon the same terms as the outward voyage. *Id.*

103. No rule has ever been adopted by the maritime law, either of England or this country, prescribing the time within which mariners should proceed to enforce their lien for wages. *The Mary*, 1 *Paine*, 180.

104. The lien of mariners has no analogy to common law liens, as regards the possession of the subject. *Id.*

105. A forbearance by seamen to libel a vessel at a port where they are discharged, before the end of the voyage, does not amount to a waiver of their lien, as against a subsequent *bona fide* purchaser. *Id.*

106. A vessel sailed with a cargo on a voyage from New-York to New-Orleans and back. She remained at New-Orleans more than a year after her arrival, waiting for freight. Not obtaining any, the master discharged the seamen, whom he persuaded to return with him in another vessel to New-York, to get their wages.

Afterwards, while the vessel was at New-Orleans, she was sold, and went a voyage to Liverpool, and thence to New-York. Holden, that the seamen could libel her on her arrival at New-York, and that they were entitled to their full wages to the time of their return to that city. *Id.*

107. The master of a ship has no lien on the vessel, for his wages or perquisites, which can be enforced in a Court of Admiralty. *The Grand Turk*, 1 Paine, 73.

108. And this difference between the remedies of the master and of the mariners for wages, has not arisen from any application of the common law doctrine of liens to the case of the master, nor from encroachments of the Common Law Courts, but because the master contracts upon the credit of the owners and not of the ship; and such a lien would be attended with great inconvenience if the master could enforce it abroad for wages due him, and thus compel a sacrifice of the ship. *Id.*

109. *Quære*, Whether a master can proceed *in personam* in Admiralty for wages? *Id.*

110. *Quære*, Whether disbursements made by the master for the ship would create a lien enforceable in Admiralty? *Id.*

111. A bond given by the master of a vessel, conditioned for the exhibition of the list of his ship's company to the first boarding officer, at the first port of his arrival in the United States, and for the production of the crew, was held to be a valid bond under the act of 28th February, 1803, although it was not expressed to be taken in pursuance of said act, and although it was not stated on the face of the bond which of the obligors was the principal and which the surety. And the declaration on the bond was held good although it did not refer to the statute. *U. States v. Hatch*, 1 Paine, 336.

112. The certificate of the consul, to excuse the master, under the proviso of this act, must state that the seamen were left in a foreign port with his consent. A certificate that they were left in a hospital unable to return, and that the master had paid for their maintenance, and left the amount of their wages, was held insufficient, and parol evidence of the consent of the consul or seamen inadmissible. *Id.*

113. The sum of 400 dollars, in which the bond is to be taken, is intended as a forfeiture, and not as a penalty to cover such damages as may be assessed. *Id.*

114. The master may hypothecate vessel and freight, in a foreign port, for advances necessary for repairing and provisioning the vessel, if such advances cannot be procured on the credit of the owner. *Murray v. Lazarus*, 1 Paine, 572.

115. *Quære*, whether, by the maritime law, the contracts of the master under such circumstances for necessaries, create a lien without an express hypothecation? *Id.*

116. But if they were admitted to have such effect, an express contract for payment would be a waiver of the implied lien. *Id.*

117. As where a vessel bound from New-Orleans to New-York, put into Wilmington in a damaged state, where the master, having no other means, obtained advances from the libellants for the necessary repairs, and gave them a draft for the amount on his consignees, which was afterwards protested for non-acceptance. On a libel against the freight, in the hands of the consignees, held, that the acceptance of the draft was a waiver of the lien if any existed. *Id.*

118. The draft was expressed to be "for value received in disbursements, and repairs of the brig Hannah," with directions to charge the same to her account, and signed by the drawer as master. Held, that the draft was not an hypothecation of the freight, as it wanted all the requisites, such as an express pledge, maritime interest, risk of the lender, of an instrument of hypothecation. *Id.*

119. Nor has such draft the effect of an equitable assignment of the freight, as a draft on a specific fund. *Id.*

120. To entitle the owner of a vessel to the forfeiture of the wages of a seaman, absenting himself from the vessel more than forty-eight hours, the entry of the absence of the seaman must be made on the log-book, on the day on which the seaman so absented himself. *The Phoebe*, 1 Wash. C. C. R. 48. *The Belsey*, 2 Wash. C. C. R. 272.

121. The master is bound to his owners, and he and they to all the world who might be affected, for his skill, care, and attention. If from want of care or skill the master injures another vessel, the owner is answerable. *Stowe v. Ketland*, 1 Wash. C. C. R. 142.

122. The principle upon which the master may bind his owners for repairs, &c. results from the general authority, with which, from the necessity of the case, he is clothed; and which nothing but proof that some other person was intrusted to manage the concern, in the particular instance, and this known to the creditor, can defeat. *Phillips v. Ledley*, 1 Wash. C. C. R. 228.

123. A mortgagee of a vessel, even before possession delivered, has the legal title; and yet he is not responsible for any repairs, nor entitled to any of the earnings of the vessel. *Id.*

124. Where a mariner shipped at a certain rate per month on a voyage from Philadelphia to Batavia, and back again; and performed the voyage to B. where he died; held, that his representatives were entitled to recover the same wages which the mariner would have been entitled to, had he lived, and performed the entire voyage back to P. *Sims v. Jackson*, 1 Wash. C. C. R. 414. S. C. 1 *Peters' Adm. Decis.* 157. *Wallon v. The Neptune*, 1 *Peters' Adm. Decis.* 142. *Scott v. The Greenwich*, *Id.* 155.

125. Where the cargo is voluntarily received at an intermediate port, freight *pro rata* is due; but where it is compulsorily received by the supercargo or captain, acting for the benefit of all concerned, no freight is earned. *Horton v. Union Ins. Co.* 1 Wash. C. C. R. 530.

126. In cases of extreme necessity, the master may sell in a foreign country, the tackle, rather than let the property perish; but not in the country where his owner lives. *Scull v. Biddle*, 2 Wash. C. C. R. 150.

127. Where the master is the hirer of the vessel, not even an implied authority can be presumed to warrant him to sell. *Id.*

128. A master may bind his owners and their property, to fulfil his contracts for money taken up in foreign ports for the necessary purposes of the voyage. Such contracts must be fair, made in a foreign country, where there is no owner, and under such circumstances of necessity, as show they were entered into with a view to the interest of the owner. *The Active*, 2 Wash. C. C. R. 226.

129. The master is bound to raise the money by means the least injurious to the owner. He should first endeavour to raise it by bills on his owner, which he is bound to accept and pay. If he cannot obtain it in this way, he may pledge the ship to repay advances with maritime interest. If the owner of the ship be also owner or part owner of the cargo, he may sell a part of the cargo in preference to borrowing at an extraordinary interest; and in his choice of means, his judgment fairly exercised, must govern him. If in none of these ways, he can raise the money, he may go beyond the general scope of his authority as master, and may sell a part of the cargo, or hypothecate the whole. But the necessity must be such as to connect the act with the success of the voyage and not for the exclusive interest of the ship owner. *Id.*

130. If the owner of the cargo be on board, and the master cannot raise the money on the credit of his owner, the merchant ought to advance his money or credit. But he is under no obligation to do so; and if he does advance he may require not only compensation in an extra premium, but satisfactory security. *Id.*

131. Such contracts however, though legal, will always be looked at with greater suspicion, than where the lender is a stranger. *Id.*

132. The general rule is, that all persons benefited by an act of the master, with a view to the general safety of all, in case of extraordinary necessity or peril, must contribute to the loss in proportion to the property saved by the act. *Id.*

133. To make a case of general average, the act must not only be performed with a view to the general safety, but it must be in a case of emergency, not produced by the misconduct or unskilfulness of the master and not resulting from the ordinary circumstances of the voyage. *Id.*

134. Where, in the course of a voyage, a ship sustains injuries which require repairs, but which resulted from ordinary decay, and not from any extraordinary cause whatsoever, the expenses incurred are not a subject of general average. *Id.*

135. A mortgagor of a ship, in possession, may pledge the freight; but if he acted as master, under the appointment of the mortgagee, his possession was that of the mortgagee, and he could not encumber the freight for a debt of his own. *Keith v. Murdock*, 2 Wash. C. C. R. 297.

136. For the conduct of the officers and crew, in the execution of the business in which they may be employed, the owners are, by the maritime law, liable, if, through ignorance or illegality, they do an injury to others. *Dias v. The Revenge*, 3 Wash. C. C. R. 262.

137. But if the master exceed his authority, and violate his orders, and is guilty of faults or crimes to the injury of others, acting in some business different from that for which he was employed, the owner is not liable. *Id.*

138. An American ship being taken by a French cruiser, and re-captured by an English frigate, and restored on payment of salvage: *Held*, that a mariner who was taken on board the French cruiser, carried to France, and there released, was entitled to wages for the whole voyage, deducting a proportion of salvage. *Hart v. The Little John*, 1 Peters' Adm. Decis. 115. *Howland v. The Lavinia*, *Id.* 129.

139. Seamen are bound to remain with a neutral ship, carried by a belligerent party into a port of the captors for adjudication, and a voluntary abandonment of their duty in this respect, amounts to desertion and forfeiture of wages. *Bordman v. The Elizabeth*, 1 Peters' Adm. Decis. 129.

140. But where they are prevented from remaining on board, either by the captors or the master, or have not provisions, or accommodations, and are without money, or means of subsistence, they are not chargeable with consequences. *Id.*

141. Seamen are not bound to remain with, or near the ship, after an unfavourable adjudication in the lower Court of Admiralty of the captors, though an appeal may be entered, and the vessel remain in custody and unsold. *Id.*

142. Where a vessel is carried in for adjudication, condemned in the lower Court of Admiralty, and an appeal is entered, the claim for wages must be suspended till the event of that appeal is known. If the owner recover freight, or damages in lieu thereof, or the ship be restored, the wages are due, and must be paid, when, and not before, he receives compensation, or recovers the ship. *Id.*

143. The carrying in a neutral ship for adjudication, or even if she be legal prize, does not in any event interrupt or defeat the claim of the seamen to wages, for a former part of the voyage, in which freight has been earned. The seamen must recover wages to the last port of delivery, and for half the time the vessel staid there. *Id.*

144. An American seaman impressed by a British cruiser, and the vessel allowed to proceed on her voyage, is not entitled to wages for the voyage. *Watson v. The Rose*, 1 Peters' Adm. Decis. 132.

145. But wages were allowed to a seaman who had been impressed, and after a short detention, rejoined his ship, and performed his duty during the remainder of the voyage. *Id.*

146. Wages were also decreed to a seaman who had been impressed, escaped, and followed the ship; and overtaking her at a port in the course of her voyage, tendered himself as ready to re-enter, and perform his contract, but was refused. *Id.*

147. Where a seaman who had been left sick at a foreign port, recovered, and might have rejoined the ship, but would not, wages were only allowed to the time when he might have rejoined. *Williams v. The Hope*, 1 Peters' Adm. Decis. 138.

148. The end of the voyage is the period when wages are due. They are payable ten days from the end of the voyage; but in some cases, fifteen are allowed for the discharge of the cargo and payment of wages. *Edwards v. The Susan*, 1 Peters' Adm. Decis. 167. In *Thompson v. The Philadelphia*, 1 Peters' Adm. Decis. 210, more than fifteen days were allowed, on proof of special indulgence to the mariner.

149. Seamen restrained by confinement and threats, are not chargeable with neglect of duty. *Thorn v. White*, 1 *Peters' Adm. Decis.* 169.

150. Broils, assaults on, or resistance to masters, do not necessarily forfeit wages. Such offences are often improperly called *mutiny*, or *revolt*; but they do not amount to this offence, which is defined by statute, and declared to be a capital crime. They may be, when the fact justifies the conclusion, evidence of intent, or overt acts, furnishing ingredients for this crime. But in general, they are merely the intemperate effects of personal animosities, sudden passion, and the like. *Id.*

151. It is the duty of seamen to bear even the ill temper of the master, and to get out of his way, when instances of passion occur. *Id.*

152. The law warrants moderate correction of mariners. When the crime of a sailor is too great for the master's authority to punish, the master and his officers are to seize the criminal, put him in irons, and not take the law into their own hands; but bring him to justice on their return. But the contract for wages is not affected. *Id.*

153. Loss or damage, accruing to the owner or master by any negligence, or crime, may be set off against wages. *Id.*

154. When a mariner is incorrigibly disobedient, and will not submit, and offer to do duty and make amends, the master may discharge him. He may correct and confine him on board the ship, or dock him of his provisions. If he refuses, or obstinately neglects to do duty, for any length of time, he does not perform his contract. Such negligence and disobedience, not temporary and fugacious, but continued, must be set off against his demand, for the period during which they exist. *Id.*

155. If he is restrained from duty by confinement, he is excused from it by the act of the master, who must, on submission, accept of his services, in most cases. *Id.*

156. If forfeitures are incurred, and the services of the seamen again unconditionally accepted, and not under a *new*, but the *old* contract, forfeitures are done away, and faults forgiven. *Whiteman v. The Neptune*, 1 *Peters' Adm. Decis.* 182.

157. Seamen have no right to interfere between the officers of the ship and any mariner they choose to confine or punish for disorderly conduct. Instead of interfering to prevent, they are bound to assist the master to constrain, imprison, and bring to justice, any disobedient, mutinous and rebellious mariner. *Relf v. The Maria*, 1 *Peters' Adm. Decis.* 192.

158. When seamen are compelled to leave the ship by cruelty and oppression, wages are recoverable. *Id.*

159. The District Courts will not take cognizance of disputes between masters and crews of foreign ships, except in special cases. *Willendson v. The Forsoket*, 1 *Peters' Adm. Decis.* 197.

160. Where the voyage is broken up, or ended here, payment of wages will be compelled; and masters will be assisted in recovering deserters, and reducing to obedience perverse and rebellious mariners. *Id.*

161. The mate and two hands were sent from the ship on shore, with the boat. One of the hands was detached, on the business of the ship, from the boat. The mate first, and then the other seaman, left the boat; and it was stolen. The sailor detached is not responsible, but the whole is chargeable to the mate and the negligent seaman. *Knap v. The Eliza*, 1 *Peters' Adm. Decis.* 200.

162. Seamen are entitled in cases of capture or wreck, to wages to the last port of delivery, and for half the time the vessel stayed there. *Giles v. The Cynthia*, 1 *Peters' Adm. Decis.* 204.

163. A port of destination, is, in this respect, the same as a port of actual delivery. And it matters not that the vessel did not carry thither any goods, but went in ballast. *Id.*

164. The log-book is evidence only in case of desertion, and then not incontrovertible and conclusive. *Jones v. The Phoenix*, 1 *Peters' Adm. Decis.* 201. *Thompson v. The Philadelphia*, *Id.* 210.

165. One seaman cannot be a witness for another, if the witness and the party have a common interest in the point in contest. As if the question be the loss of the ship, embezzlement equally affecting the whole crew, &c. *Thompson v. The Philadelphia*, 1 *Peters' Adm. Decis.* 210.

166. A seaman who ships without signing articles, is not subject to the penalties and forfeitures of the act of Congress, but is subject to all the forfeitures imposed, and rules fixed by the maritime law pre-existent to the act of Congress and not altered by the statute. He must be paid at the highest rate of wages, given at the port of shipment, within three months next precedent. *Jameson v. The Regulus*, 1 *Peters' Adm. Decis.* 212.

167. An agreement in the shipping articles, "that no officer or seaman belonging to the said ship shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the port of discharge, is not a contract that the risk shall be insured, or the arrival guaranteed, by the mariner, but an agreement that such wages as were legally due at a foreign port, should be paid only at the port of discharge. *Johnson v. The Lady Wallerstoff*, 1 *Peters' Adm.* 215.

168. The ration established for the navy, by the act of Congress, of July 1, 1797, sec. 7, was agreed to be that by which the allowance to seamen should be determined. *Mariners v. The Washington*, 1 *Peters' Adm. Decis.* 220.

169. If the voyage is likely to be uncommonly procrastinated; if provisions are, by accidents, diminished in quantity, the master may, justifiably, abridge the allowance. *Id.*

170. A part of the wages of the seamen cannot be withheld to indemnify the owners against damages, claimed in a suit depending at common law, for injuring another vessel; no contribution can be levied until a recovery is had, and the quantum ascertained. *Id.*

171. Where mariners had been put on short allowance, a sum was adjudged to the seamen at the rate of one day's pay to each mariner, for every day full allowance was not served out. *Gardner v. The New-Jersey*, 1 *Peters' Adm. Decis.* 223.

172. The policy of the law which obliges mariners, engaged for a voyage, to be responsible for each other in cases of embezzlement, does not apply when occasional labourers, or other strangers, commit depredations without the fault, negligence, or connivance of all, or any part of the crew. *Mariners v. The Kensington*, 1 *Peters' Adm. Decis.* 240.

173. The burthen of proof lies on the crew, who are answerable for embezzlement, unless they can clearly show that it was committed by persons not of the crew. *Id.*

174. Although part of the embezzlement is fixed on, and paid by some of the crew, yet all are to contribute to the residue. *Cranmer v. The Fair American*, 1 *Peters' Adm. Decis.* 242.

175. The whole must contribute, according to their respective wages, the captain and officers of the ship included. Nor is any one to be excused from this general contribution, though absent from the ship, and not in a situation to be capable of assisting in the plunder. *Id.*

176. The master is answerable to the owners for damages accruing to them by his improper and illegal discharge of mariners, as well as for extravagant wages given to, or injurious contracts made with them. *Athyns v. Burrows*, 1 *Peters' Adm. Decis.* 245.

177. The master may displace the mate for just and lawful cause; but this cause may be inquired into. *Id.*

178. The mate may be removed for fraudulent, unfaithful, and illegal practices; or gross and repeated negligence; or for flagrant, wilful and unjustifiable disobedience; or incapacity brought on him by his own fault, or for palpable want of skill in his profession. *Id.*

179. The safety of the ship often depends on this officer, who is sometimes more trust-worthy and capable than the master; and commonly placed by the owners to

increase the security of their property. In case of the absence, incapacity, or death of the captain, the command and responsibility devolve on the mate. *Id.*

180. Mate not being lawfully displaced, and offering to do his proper duty, should be received. If a loss accrues to the owners in consequence of a refusal to receive him, the master is responsible. *Id.*

181. If one ships as an officer, or mariner, and either expressly or impliedly professes himself a mariner capable of executing the contract, and it turns out otherwise, the Court will not allow him wages at all, or will allow him a *quantum meruit* according to circumstances. *Id.*

182. When mariners are shipped "for the voyage," unless specially obliged by the articles, *it seems*, they are not bound to unlade the ship after the voyage is ended. The voyage is ended when the vessel has arrived at her last port of delivery and is there safely moored. *Hastings v. The Happy Return*, 1 *Peters' Adm. Decis.* 253.

183. Should it be deemed an additional duty to their common maritime employment to unlade the cargo, they are only answerable in damages for neglect or refusal. The contract for the voyage cannot be so amplified and prolonged, as to subject mariners to forfeitures after the voyage is completed, though the lading or ballast be not discharged. *Id.*

184. If the master, officer, or seaman, has been guilty of *gross negligence* in any point peculiar to his duty, he alone is responsible. *Wilson v. The Belvidere*, 1 *Peters' Adm. Decis.* 258.

185. Where a voyage is broken up by seizure for the debts of the owners, extra wages will be allowed to the sailors according to circumstances, but damages for loss of time and expenses on shore, are seldom given. *Wolf v. The Oder*, 2 *Peters' Adm. Decis.* 261.

186. A mariner affected with a severe pulmonic disease, shipped as an able bodied seaman, to perform a voyage to the East Indies. He died of this complaint soon after the vessel left port. Wages refused. *Writer, Admr. v. The Richmond*, 2 *Peters' Adm. Decis.* 263.

187. Where a voyage is broken up for the interest of the owner, an additional allowance is usually given of from one to three months' pay. *Hindman v. Shaw*, 2 *Peters' Adm. Decis.* 264.

188. But if the merchant has found the seamen their passage home, and supplies, it has been considered a substitute for the additional wages. *Id.*

189. The mate is permitted to sue in the admiralty, as a mariner, and all general rules in cases of mariners, apply to him. *Atkyns v. Burrows*, 1 *Peters' Adm. Decis.* 246.

190. So the cook and steward may sue in the admiralty as mariners and part of the crew. *Black v. The Louisiana*, 2 *Peters' Adm. Decis.* 268.

191. Seamen cannot directly insure their wages. *M'Quirk v. The Penelope*, 2 *Peters' Adm. Decis.* 276.

192. Where mariners were taken on board the captor, and the captured vessel was sent into Cumana, and afterwards liberated. Held, that seamen who had escaped from the captors, were entitled to wages for the voyage, deducting whatever they had earned after their separation from the vessel. *Singstrom v. The Hazard*, 2 *Peters' Adm. Decis.* 384.

193. When a vessel bound to a port, which was found on her arrival near it to be blockaded, and therefore the ship had been turned off, and proceeded to another port, though not originally contemplated in the shipping articles, yet if the cargo, or any part, was there delivered it should be considered as a delivering port as much as if originally so intended. And if the vessel, after leaving that port, was captured or lost, the mariners are entitled to wages due to the time of arrival at that port, and for half the time of stay there. *Cranmer v. Gernon*, 2 *Peters' Adm. Decis.* 391.

194. Where a cargo, or part thereof, was purchased at neighbouring ports or places, and the vessel went to one or more of them for all or part; the last port of lading and departure should be that to which the payment of wages should apply. *Id.*

195. Where mariners had deserted from a ship on shore and in a perilous situation, and were confined at the instance of the master. The Court held the voyage broken up by the misfortunes of the ship, and discharged the mariners from imprisonment. *Sims v. Mariners*, 2 *Peters' Adm. Decis.* 393.

196. Seamen deserting a vessel under circumstances of distress or danger, are answerable for the damages which may be sustained in consequence of their dereliction of duty, and lose their wages. *Id.*

197. The contract between the owners and master of a ship is, that if the master well and faithfully performs the voyage, the owners agree to pay his monthly wages, and allow the customary privileges annexed to his office. But it is no part of the contract that a master once engaged shall be master for the voyage. *Montgomery v. Wharton*, 2 *Peters' Adm. Decis.* 397.

198. The law implies sundry engagements of the captain to the mariners. Two of which are: 1st, that at the commencement of a voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found *seaworthy*; 2d, that the captain shall supply the mariners with good and sufficient provisions whilst they are in his service. *Dixon v. The Cyrus*, 2 *Peters' Adm. Decis.* 409.

199. Gross and unnecessary deviation from the designated voyage, will free a mariner from his contract. *Moran v. Baudin*, 2 *Peters' Adm. Decis.* 415.

200. Where cruel and unwarrantable chastisement has been inflicted, the Court will dissolve the contract, and decree wages to the seamen to the time of their leaving the ship, and sometimes even for the whole voyage. *Rice v. The Polly and Kitty*, 2 *Peters' Adm. Decis.* 420. *Weiburg v. The St. Olaf*, *Id.* 428.

201. Though the master of a ship is possessed of extensive powers, and may hypothecate under certain circumstances, yet he cannot sell the ship. *Skrine v. The Hope*, *Bee*, 2.

202. If a voyage be interrupted without the fault of the crew, they shall receive wages during the time they work on board the vessel in port. *Bray v. The Atlanta*, *Bee*, 48.

203. Double wages are due by the act of Congress in cases of failure of provisions, if the ship sail without the quantity specified in the act. *Coleman v. The Harriet*, *Bee*, 80.

204. Where a vessel had been sold under sentence of a foreign Court of Admiralty, at the suit of *others* of the crew, and these libellants had notice of the proceedings, but did not apply for their wages. *Held*, that their lien on the vessel was at an end. *Trump v. The Thomas*, *Bee*, 86.

205. Wages, decreed upon the captain's certificate that they were due, though the vessel was in port, earning freight. Such certificate is the best evidence, no articles being produced. *Minors v. The Mary*, *Bee*, 119.

206. Seamen absent from a ship, without any fault of their own are nevertheless entitled to full wages. *Seamen v. The Fair American*, *Bee*, 134.

207. Seamen may be moderately corrected by the captain. This Court will not interfere in the case of foreigners where they are bound by articles to submit all disputes to a home tribunal. *Aertsen v. The Aurora*, *Bee*, 161.

208. It is a general rule that all the crew must contribute to make good the amount embezzled. But proof will be admitted to show the innocence of some. *Sullivan v. Ingraham*, *Bee*, 182.

209. Forfeiture of half a seamen's wages was decreed, in consequence of his striking the captain. The latter had inflicted *other* punishment for the offence, which prevented the Court from decreeing forfeiture of the whole. *Sprague v. Kain*, *Bee*, 184.

210. A person hired for a particular purpose as nominal captain, is entitled to wages agreed upon with the real captain, and so far the vessel and owners are bound. *L'Arina v. The Exchange, Bee, 198.*

211. Forfeiture of half a mate's wages was decreed in consequence of such improper behaviour, as made it necessary to dismiss him when the voyage was about half performed. *Humphreys v. The America, Bee, 237.*

212. The owners of a ship are liable for wages if the vessel prove insufficient to pay them. *Carey v. The Kitty, Bee, 254.*

213. If a seaman dies before the completion of the voyage, his representatives shall have his wages up to the time of his death, and not beyond it. *Carey v. The Kitty, Bee, 254.*

214. Such is the maritime law, when the contract is by the month. *Perkins v. The Hazard, Bee, 441.*

215. A captain has no power to bind his owners and their vessel to the payment of a mariner's wages for three months after his discharge, and after all services at sea and elsewhere have ceased. *Canizares v. Santissima Trinidad, Bee, 353.*

216. Owners of a vessel which they have chartered to others, may dismiss the master they have appointed before the completion of the voyage, (although he has signed bills of lading for the cargo, and shipped his mariners,) without the owners showing sufficient cause for such dismissal. In cases of real injury the master must apply to the laws of his country for redress. *Montgomery v. Wharton, Bee, 388. S. C. 2 Peters' Adm. Decis. 397.*

217. If a single mariner withholds his consent, and the cruise is broken up by the rest of the concerned, and a new cruise commenced, this must be done subject to the legal claim of the unconsenting mariner for wages or prize money that may accrue during the term of the first cruise for which he contracted. *Hainey v. The Tristram Shandy, Bee, 414.*

218. A mariner ships at Philadelphia, in time of war, for Bordeaux and back again. While the ship is at Bordeaux, peace takes place. The ship returns to Philadelphia, which terminates the voyage. The mariners' wages shall not be lessened, on account of the decrease of the risk on the homeward voyage. *M'Culloch v. The Lethe, Bee, 423. Shaw v. The Lethe, Bee, 424.*

219. Mariners ship at Philadelphia, in January, 1783 on a voyage to L'Orient and back again, it being a time of war. The ship falls down the river in order to commence her voyage, but does not enter on the high seas until the 20th March, 1783. In the mean time, viz. on the 3d March, peace takes place. The mariners receive their full wages, according to contract, from the time of signing the articles until 3d March, and only customary peace wages after the 3d March, until the completion of the voyage. *Brice v. The Nancy, Bee, 429.*

STATUTES OF THE UNITED STATES.

- I. *Acts of Congress in general.*
- II. *Bankrupt acts.*
- III. *Crimes acts.*
- IV. *Embargo and non-intercourse acts.*
- V. *Judiciary acts.*
- VI. *Neutrality acts.*
- VII. *Patent acts.*
- VIII. *Priority acts.*
- IX. *Revenue and Navigation acts.* (A) *Impost acts.* (B) *Excise acts.* (C) *Registry of vessels acts.* (D) *Slave trade acts.*

STATUTES OF THE UNITED STATES I.

Acts of Congress in general.

1. An offence against a temporary statute cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose. *The Irresistible*, 7 *Wheat*. 551.

2. It is a rule in the construction of public statutes, that in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power, the word "may" is to be construed "must." *Minor v. Mechanics' Bank of Alexandria*, 1 *Peters*, 64.

3. The act of 30th March, 1802, having described what should be considered as the Indian country at that time, as well as at any future time when purchases of territory should be made of the Indians, the carrying of spirituous liquors into a territory so purchased after March, 1802, although the same should be at the time frequented and inhabited exclusively by Indians, would not be an offence within the meaning of the acts of 30th March, 1802, ch. 273, and 6th May, 1822, ch. 58, for regulating trade and intercourse with the Indian tribes, so as to subject the goods of the trader, found in company with those liquors, to seizure and forfeiture. *American Fur Company v. U. States*, 2 *Peters*, 359.

4. Where no other time is fixed for the operation of a penal statute, it takes effect from the time of its passage; and ignorance of the existence of such act forms no legal excuse for a violation of it. *The Ann*, 1 *Gallis*. 62.

5. It is a general rule, that where any period or term of time is required to begin to run from and after the doing of any act, it includes the day on which such act is done. *United States v. Arnold*, 1 *Gallis*. 356.

6. If a statute be general, without a direct application to foreign contracts, the rule approved by *Casaregis* seems proper to be adopted, that its construction should not be extended to such contracts. *Van Reimsdyk v. Kane*, 1 *Gallis*. 377.

7. An act laying duties on goods imported "from and after the passage of the act," takes effect the beginning of the day on which it is passed, and not from the time of its being signed by the President. *U. States v. Williams*, 1 *Paine*, 261.

8. But, in case of a prosecution for a forfeiture? *Quære. Id.*

9. Consent is essential to guilt; and the legislature is supposed to pass all penal laws with the understanding that Courts will not inflict the penalties for such violations as are unintentional. *The William Gray*, 1 *Paine*, 16.

10. The rule that penal statutes are to be construed strictly, means that they ought not to be extended by their spirit or equity to other offences than those which are clearly described and provided for. But Courts are not prevented by this rule from inquiring into the intention of the legislature. *The Enterprize*, 1 *Paine*, 32.

11. Where there is such an ambiguity in a penal statute, as to leave reasonable doubts of its meaning, it is the duty of a Court not to inflict the penalty. *Id.*

12. As it regards trade laws, unless previous notice of them be brought home to the party charged with violating their penal provisions, they are to be considered as beginning to operate in the respective collection districts only from the time they are received from the proper department by the collector. *The Cotton Planter*, 1 *Paine*, 693.

13. Alien enemies who had enrolled themselves as volunteers, and been accepted by the President, under the act of 6th February, 1812, are not entitled to be discharged; there being no law enjoining the President from accepting them. *Wilson v. Izzard*, 1 *Paine*, 68.

14. *It seems*, that the President had a right to accept volunteers, to serve at a particular post as well as for general service, the act being silent on the subject. At any rate, he had a discretion in the premises, not to be controlled by a Court of justice. *Id.*

15. The insertion in their enrolment of the officer's name under whom the volunteers were to serve, was meant merely to ascertain the post where they were to serve by designating its commander, and not to attach them to his personal command, so that he could not be changed. *Id.*

STATUTES OF THE UNITED STATES II.

Bankrupt acts.

16. The true rule, in cases of bankruptcy, is, that if the *original* ground of action is founded in contract, but the immediate cause arises *ex delicto*, and the claim is for damages unliquidated by express agreement, or such as will not be implied, the certificate is not a bar; as such a claim could not have been set up under the commission. *Dusar v. Murgatroyd*, 1 *Wash. C. C. R.* 13.

17. If the defendant had agreed to pay a certain sum on failure to perform his agreement; or if the plaintiff could bring either trespass, or money had and received, and waives the former by bringing the latter, the damages are due, which the law implied a promise to pay, and may be proved under the commission. *Id.*

18. A debtor concealing himself from, and being denied to his creditors, does not constitute an act of bankruptcy under the laws of the United States, unless the service of the process is thereby prevented. *Barnes v. Billington*, 1 *Wash. C. C. R.* 29.

19. If the debtor order himself to be denied to creditors and others, and is in consequence thereof denied to an officer who comes to serve process, it is an act of bankruptcy; provided the officer comes to serve the process and not on other business, and the denial has taken place within six months of the issuing of the commission. *Id.*

20. Giving a bond with warrant to confess judgment, to one creditor, upon the eve and in contemplation of bankruptcy, does not constitute an act of bankruptcy, unless the judgment entered on the bond, and the issuing of the execution, was at the instance or by the procurement of the debtor. Such a bond would be a fraud on the general creditors. *Id.*

21. Denial to an officer, whereby he is prevented from serving process, must be *really adversary*, and not by concert between the creditor and the debtor to bring about an act of bankruptcy. *Id.*

22. The holder of negotiable paper, payable "without defalcation," under the laws of Pennsylvania, assigned after a commission of bankruptcy has issued, may come in under the commission, allowing all just off-sets, existing at the time of the bankruptcy, and which would have been admitted if the assignment had not been made. *Humphreys v. Blight*, 1 *Wash. C. C. R.* 44.

23. The purchaser of a negotiable note, who becomes so after a commission of bankruptcy has issued, may prove under the commission; and he holds the note, subject to all legal off-sets. *Id.*

24. Perjury committed in proceedings under the bankrupt law, cannot be prosecuted under the general criminal law of the United States, the 18th section of which applies to perjuries committed in *judicial proceedings*, whether orally or by deposition. *Anonymous*, 1 *Wash. C. C. R.* 84.

25. For a perjury under the bankrupt laws, an indictment will not be supported at common law; because, there must not only be a false oath, but it must be taken in *some judicial proceedings*, in a matter material to the issue. *Id.*

26. No debt, but such as is due and owing at the time of bankruptcy, can be proved under the commission; and, consequently, an endorser or acceptor of a bill of exchange, drawn by the bankrupt, who has not paid it before the bankruptcy, cannot prove the debt. *Marks v. Banker*, 1 *Wash. C. C. R.* 178.

27. Devise to A for life, and after the death of A, that the estate should be sold and divided among the grand-children of the testator then living. B married one of the grand-children, became a bankrupt, and obtained his certificate before the death of A. *Held*, that the interest of B in the estate of his wife under the will of A, did not pass to the assignees. *Krumbaar v. Burt*, 2 *Wash. C. C. R.* 406.

STATUTES OF THE UNITED STATES III.

Crimes acts.

28. Under the crimes act of the 26th of March, 1804, c. 393, [xl.] s. 2, on an indictment for destroying a vessel with intent to prejudice the underwriters, it is sufficient to show the existence of an association actually carrying on the business of insurance, by whose known officers *de facto* the policy was executed, and to prejudice whom, the vessel insured was destroyed; without proving the existence of a legal corporation authorised to insure, or a compliance on the part of such corporation with the terms of its charter, or the validity of the policy of insurance. *The United States v. Amedy*, 11 *Wheat.* 392.

29. The terms "any person or persons," in the above act, extend to *corporations* and bodies politic, as well as *natural persons*. *Id.*

30. Error in the phraseology of the second section of the crimes act of the 26th March, 1804, c. 393, [xl.] *Id.* 393, *note a.*

31. Although the crimes act of 1790, c. 36, [ix.] s. 12, does not define the offence of *endeavouring to raise a revolt*, it is competent for the Court to give a judicial definition of it. *The United States v. Kelly*, 11 *Wheat.* 417.

32. The offence consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person. *Id.*

33. If an indictment charge the perjury to be committed at the Circuit Court held on the 19th day of May, and the record show the Court to have been held on the 20th day of May, the variance is fatal. *United States v. McNeal*, 1 *Gallis.* 387.

34. Whether perjury, committed on a hearing on a criminal complaint before the District Judge, be within the act, 1790, ch. 9, sec. 18. *United States v. Clark*, 1 *Gallis.* 497.

35. To constitute the offence of piracy within the act 1790, ch. 9, by "piratically and feloniously" running away with a vessel, personal force and violence, is not necessary. *United States v. Tully*, 1 *Gallis.* 247.

36. The "piratically and feloniously" running away with a vessel, within the act, is the running away with a vessel, with an intent to convert the same to the taker's own use, against the will of the owner. The intent must be *animo furandi*. *Id.*

37. The Circuit Court has cognizance under the act, 1790, ch. 9, sec. 8, of piracy on board of an American ship, although committed in an open roadstead, adja-

cent to a foreign territory, and within half a mile of the shore. *United States v. Ross*, 1 *Gallis*. 524.

38. It is not necessary, in an indictment for resisting a public officer, to set forth the particular exercise of office, in which he was engaged, or the particular act and circumstances of obstruction. *United States v. Bachelder*, 2 *Gallis*. 15.

39. An endeavour to make a revolt within the act of April 30th, 1790, ch. 9, sec. 12, is an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is in effect an endeavour to make a mutiny among the crew of the ship. *United States v. Smith*, 1 *Mason*, 147.

40. On an indictment for an endeavour to make a revolt in a ship, founded on the 12th section of the act of 30th April, 1790, ch. 9, it is not necessary to prove that it was committed on the high seas. *United States v. Hamilton*, 1 *Mason*, 443.

41. An indictment for perjury cannot be sustained on the 7th and 8th sections of the act of 29th July, 1813, ch. 34, granting a bounty to vessels engaged in the fisheries, unless the certificate required by the 7th section be sworn to by the *same* person (whether owner of the vessel, or his agent or representative) who *signs* the certificate. If the owner signs the certificate and the agent swears to it, the case is not within the statute. *United States v. Kendrick*, 2 *Mason*, 69.

42. Larceny committed on board an American ship, in an enclosed dock, in a foreign port, is not punishable under the statute of 30th April, 1790, ch. 9, § 16. *United States v. Hamilton*, 1 *Mason*, 152.

43. An endeavour to commit a revolt is an offence within the 12th section of the act of 1790, ch. 9, if committed in a *foreign port*. The section does not confine the penalty to cases on the high seas. *United States v. Keefe*, 3 *Mason*, 475.

44. An offence committed in a *bay*, which is entirely land locked and enclosed by reefs, is not committed on the *high seas* within the purview of the act of Congress of 26th March, 1804, ch. 40. *United States v. Robinson*, 4 *Mason*, 307.

45. Under the statute of 1790, ch. 9, § 28, which requires, that in capital cases a copy of the indictment, &c. should be delivered to the prisoner two entire days before the trial, the word "*trial*" means the trying the cause by the jury, and not the arraignment and pleading preparatory to such trial by the jury. *United States v. Curtis*, 4 *Mason*, 232.

46. Where two or more persons are jointly indicted for a capital offence, as for murder, they are not, as matter of right, entitled to a separate trial if they request it; but it is matter of discretion to be judged of by the Court under all the circumstances of the case. Motion for a separate trial denied. *U. States, v. Marchant*, 4 *Mason*, 158. *Affirmed on appeal*, 12 *Wheat*. 480.

47. A revolt is an usurpation of the authority and command of the ship, and an overthrow of that of the master or commanding officer. Any conspiracy to accomplish such an object, or to resist a lawful command of the master for such purpose, and any endeavour to stir up others of the crew to such resistance, is an endeavour to commit a revolt, within the meaning of the 12th section of the statute of 1790, ch. 9. *U. States v. Hemmer*, 4 *Mason*, 105.

48. A confinement of the master, within the statute of 1790, ch. 9, s. 12, is not limited merely to a seizure of the master and preventing the movement of his body, or to locking up in a particular place, as a cabin or stateroom, but extends to all restraints of personal liberty in freely going about the ship, by present force, or threats of bodily injury. *Id.* *U. S. v. Sharp*, 1 *Peters' C. C. R.* 118. *U. S. v. Smith*, 3 *Wash. C. C. R.* 78.

49. Seamen of the United States, put on board a vessel of the United States by a consul, are within the meaning of the act of 1790, ch. 9; s. 12, and they are bound by the same obligations which exist in cases of articleed seamen. *U. States v. Sharp et al.* 1 *Peters' C. C. R.* 118.

50. One who joins in the general conspiracy, and by his presence countenances acts of violence, but who does not individually use force or threats, to compel the master to resign the command of his vessel, is guilty of the offence of confining the master. *Id.*

51. If the master of a vessel is restrained from performing the duties of his station, by such mutinous conduct of the crew, as would reasonably intimidate a firm man; this is a confinement, within the meaning of the act of Congress. The master going armed, to every part of the vessel, if it was necessary for his safety that he should so protect himself, does not alter the case. *U. States v. Bladen*, 1 *Peters* C. C. R. 213.

52. Seizing the person of the master, although the restraint be but momentary, is a *confinement*, and such conduct is not excused or justified by a previous battery on the seamen; whose duty it was to have obeyed the command of the captain, which was enforced by such battery. *Id.*

53. Where an attack has been made upon the dwelling house of a foreign minister, to constitute it an offence against the law of nations, and the act of Congress of April 30th, 1790, ch. 36, the defendant must have known that the house on which the attack was made was the domicile of a minister; otherwise it is merely an offence against the municipal laws of the state. *U. States v. Hand*, 2 *Wash.* C. C. R. 435.

54. The 22d section of the act of April 30th, 1790, ch. 36, includes every species of process, legal and judicial, whether issued by the Court in session, or by a judge or magistrate, acting in that capacity out of Court, in the execution of the laws of the United States. *U. States v. Lukins*, 3 *Wash.* C. C. R. 325.

55. The offence, (in the case of a writ of *habere facias possessionem*,) is complete, when the person in possession refuses, and by threats of violence, which it is in his power to enforce, prevents the officer from dispossessing him. *U. States v. Lowrys*, 2 *Wash.* C. C. R. 169.

56. Where an indictment for perjury did not state the day upon which the trial took place, and on which the defendant had sworn in the case in which the perjury was alleged to have been committed, the Court arrested the judgment. *U. States v. Bowman*, 2 *Wash.* C. C. R. 328.

57. The 8th section of the act of April 30, 1790, ch. 36, makes murder and robbery on the high seas, piracy; the words "which if committed in the body of a country," do not relate to "murder" or "robbery," but to the words immediately preceding them, "or any other offence." *U. States v. Jones*, 3 *Wash.* C. C. R. 209.

58. The 8th and 9th sections of the law for the government of the navy, ch. 167, relate expressly to prizes, or to vessels seized as prize, and not to acts of piracy; and the act of 26th June, 1812, ch. 430, is confined to the conduct of persons on board of privateers, and is intended for their government. These laws do not repeal the provisions of the law relating to piracy. *Id.*

59. Robbery is the felonious taking of goods from the person of another, or, in *his presense*, by violence, or by putting him in fear, and against his will. *Id.*

60. The general rule of law, that robbery on the high seas is piracy, has no exception or qualification in favour of commissioned privateers, in any act of Congress, in the common law, or in the law of nations. *Id.*

61. The law for the better government of the navy, which enjoins on inferior officers and privates the duty of obedience to their superiors, speaks of the *lawful orders* of the superiors. *Id.*

62. If many go to do an unlawful act, and one only do it, all are principals. But, if they go to do a lawful act, as to visit a vessel to ascertain her character, and all but one commit a felony, though in his presence, but without his participation, their crime is not imputable to him. *Id.* *U. States v. Jones et al.* 3 *Wash.* C. C. R. 228.

63. The crimes of piracy mentioned in the 8th section of the act of April 30, 1790, are such as are committed by citizens of the United States, or on board of vessels of the United States; and therefore, the 10th and 11th sections, as to accessaries, refer to the acts of piracy mentioned in the 8th section. *U. States v. Howard*, 3 *Wash.* C. C. R. 340.

64. A confederacy by citizens on land, or on board of an American vessel, with sea robbers, or pirates, by the laws of nations; or the yielding up of a vessel by a citizen to such pirates, is within the provisions of the 8th section of the act. *Id.*

65. An endeavour by a mariner to corrupt the master of a vessel, and to induce him to go over to such pirates, is within the provisions of the 8th section of the act. *Id.*

66. To establish the crime of confederacy, there must be some proof of criminal intentions in the person charged. *Id.*

67. The language of the 12th section of the law implies compact or association with the pirates, as well in relation to the past, as to the future. Any intercourse with them, which is calculated to promote their views, is within the provisions of the act. *Id.*

68. The 28th section of the act of April 30, 1790, which requires a list of the witnesses to be delivered to the prisoner, three days before the trial, is confined to treason; nothing more being required, in any other capital offences, than the delivery of a copy of the indictment and a list of the jurors. *U. States v. Wood*, 3 Wash. C. C. R. 440.

69. Upon an indictment for robbing the mail, and putting the life of the mail-carrier in jeopardy, a sword or pistol, in the hand of the robber, by terror of which the robbery is effected, is a dangerous weapon, within the law; although the sword be not drawn, and the pistol be not pointed. It is not necessary to prove that the pistol was charged; it is presumed to be so, until the contrary is proved. *Id.*

STATUTES OF THE UNITED STATES IV.

Embargo and non-intercourse acts.

70. Under the embargo act of the 25th April, 1808, c. 170, [lxvi.] if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector, that her demand of a permit to land the cargo was merely colourable, this is not a termination of the voyage so as to preclude the right of detention. *Otis v. Walter*, 6 Wheat. 583.

71. Under what circumstances the collector has a right to land the cargo of the vessel thus detained. *Id.*

72. The non-intercourse act of the 13th of April, 1816, ch. 65, prohibits the coming of British vessels to the ports of the United States, from a British port closed against the commerce of the United States, either directly, or through an open British port; but it does not prohibit the coming of such vessels from a British closed port, through a foreign port, (not British,) where the continuity of the voyage is fairly broken. *The Pitt*, 8 Wheat. 357.

73. If a British ship come from a foreign port (not British) to a port of the United States, the continuity of the voyage is not broken, and the vessel is not liable to forfeiture, under the act of April 18th, 1818, ch. 65, by touching at an intermediate British closed port, from necessity, and in order to procure provisions, without trading there. *The Frances and Eliza*, 8 Wheat. 398.

74. Under the embargo act of the 25th of April, 1808, ch. 170, [lxvi.] s. 11, the collector is protected in the honest exercise of his discretion in detaining the vessel, and securing both vessel and cargo, until an actual termination of the voyage. *Otis v. Walter*, 11 Wheat. 192.

75. Whether the voyage has terminated, is a question of fact; and if the voyage be colourably, but not really terminated, the collector may detain the vessel, if he has honest suspicions. *Id.*

76. The exportation of goods to a foreign country, contrary to the act of 9 Jan, 1809, ch. 72, s. 1, is a misdemeanor, of which the Circuit Court has original cognizance; and it seems the prosecution may well be by information. *United States v. Mann*, 1 Gallis. 3. 177.

77. An offence punishable under that act, by fine and imprisonment, was not saved from repeal by the saving clause of the 2d section of the act of 28 June, 1809, ch. 9. *Id.* 177.

78. The Circuit Court of the United States has jurisdiction over such an offence. *Id.* 177.

79. In debt for the double value under the 3d section of the embargo act, 9 Jan. 1808, ch. 8, it was not necessary to allege the particular articles which composed the cargo; nor that the owner was knowingly concerned in the illegal voyage. *Cross v. United States*, 1 Gallis. 26.

80. Under the 5th section of the embargo act of 9 Jan. 1808, ch. 8, "foreign vessel" means a vessel navigating under the flag of a foreign power, and not a vessel owned in whole or part by foreigners domiciled in the United States. *The Sally*, 1 Gallis. 58.

81. A departure from any place within any port, is within the jurisdictional limits of the United States, though not within the embargo act, 1807, ch. 5. *The Ann* 1 Gallis. 62.

82. A registered vessel was within the prohibition of the 3d sec. of the act, 1808, ch. 8. That section was not repealed by the 19th sec. of the act, 1809, ch. 91, or 2d sec. of the act, 28th June, 1809, ch. 9. *The Short Staple*, 1 Gallis. 104. *The Argo*, 1 Gallis. 850.

83. Under the 3d sec. of the act, 1805, ch. 8, the return cargo was not affected with forfeiture. *Id.*

84. The saving of the 14th section of the act of 8 March, 1809, ch. 91, saves such provisions or sections only of the embargo acts as were exclusively directed to collection districts adjacent to a foreign territory, or vessels bound to such districts. *The Falmouth*, 1 Gallis. 130.

85. The President's proclamation of the 9th August, 1809, was without legal operation, and did not revive the non-intercourse act of 1st March 1809, ch. 91. *The Orono*, 1 Gallis. 137.

86. By the 19th sec. of the act of 1st March, 1809, ch. 91, and the 2d section of the act of 28th June, 1809, ch. 9, the embargo acts were as to future cases repealed. *Id.*

87. Penalties under the embargo act, 1808, ch. 8, are to be sued for within the time limited by the statute of limitations, 1790, ch. 9; and not by the act, 1799, ch. 128, sec. 89, or the act, 1804, ch. 40. *United States v. Mayo*, 1 Gallis. 397.

88. A vessel sailing to an interdicted port, unless by permission of the President, on the public service, was liable to forfeiture, under the 3d sec. of the act, 1809, ch. 9. *The Wash.* 1 Gallis. 140.

89. The act of 1809, ch. 91, applied to all goods of British manufacture, although imported into a neutral country before the passing of that act. *Ten Hogsheads of Rum*, 1 Gallis. 188. *The Rose* 1 Gallis. 211.

90. To constitute an importation, there must be a voluntary arrival within some port, with intent to unlade the cargo. An involuntary arrival, by stress of weather, does not constitute an importation. *The Mary*, 1 Gallis. 206. *The Boston*, 1 Gallis. 239. *United States v. Arnold*, 1 Gallis. 348. *United States v. Lindsey*, 1 Gallis. 365.

91. A coming into port with a cargo, is *prima facie* evidence of importation. *Id.* *Perot v. U. States*, 1 Peters' C. C. R. 256.

92. Goods of British growth, although not liable to duties, were prohibited from importation by the act, 1809, ch. 91. *The Mars*, 1 Gallis. 237.

93. The repealing clauses in the act of 1814, ch. 115, did not operate strictly as repeals of the act of 1st March, 1809, ch. 91, so far as revived by the act of 2d March, 1811, ch. 96, but as exceptions to the general provisions of those acts in favour of British goods imported in neutral vessels. *United States v. Hayward*, 2 Gallis. 485.

94. By the conquest and occupation of *Castine* by the enemy, that territory passed under the temporary allegiance and sovereignty of the enemy; and of course, the sovereignty of the United States was, during the same period, suspended, and the laws of the United States could no longer be rightfully enforced there. *Castine*, during such occupation, was not a port of the United States with

117. The judgment of the highest Court of Law of a State, deciding in favour of the validity of a statute of a State, drawn in question on the ground of its being repugnant to the constitution of the United States, is not a *final* judgment within the 25th section of the judiciary act of 1789, ch. 20; if the suit has been remanded to the inferior State Court where it originated, for further proceedings according to law. *Winn v. Jackson*, 12 *Wheat.* 135.

118. The 11th section of the judiciary act of Sept. 24th, 1789, which relates to service of process, is not a denial of jurisdiction, but the grant of a privilege to the defendant not to be sued out of the State where he resides, unless he shall be sued with process in the State where the suit is brought. *Harrison v. Rowan*, 1 *Peters' C. C. R.* 489.

STATUTES OF THE UNITED STATES V.

Neutrality acts.

119. The proviso in the repealing clause of the neutrality act of the 20th of April, 1818, did not authorise a forfeiture under the act of the 3d of March, 1817, (which was included in the repeal,) after the time when that act would have expired, by its own limitation. *The Irresistible*, 7 *Wheat.* 552.

120. It is an offence against the act of 5th June, 1794, to concert an expedition from the United States to commit hostilities against a power at peace with the United States; and it is unimportant that such association originated beyond the seas, if the expedition was carried on from hence. *Ex parte Needham*, 1 *Peters' C. C. R.* 487.

121. It is unimportant whether the persons engaged in such a purpose engage the whole vessel to themselves, or departed from the United States as passengers. *Id.*

122. Under the 4th section of the act of 5th June, 1794, raising or lowering the gun carriages, or cutting away the decayed wood in them, and replacing them with sound wood, by which they are rendered fit for use, is increasing the force of the vessel, by an equipment solely applicable to war, and is expressly within the words and meaning of the act of Congress. *United States v. Grassin*, 3 *Wash. C. C. R.* 65.

123. An augmentation of force in our ports is a breach of neutrality, and of the law of nations, and of the United States; and will occasion a restitution of the prize if brought within our jurisdiction. *British Consul v. The Nancy, Bee*, 73.

124. Equipment for war in a neutral port, does not take place merely by alteration of two ports in repairing the waist of a vessel previously armed. *Moodie v. The Brothers, Bee*, 76.

STATUTES OF THE UNITED STATES VII.

Patent acts.

125. A party cannot entitle himself to a patent for more than his own invention; and if the patent be for the whole of a machine, he can maintain a title to it only by establishing that it is substantially new in its structure and mode of operation. *Evans v. Eaton*, 7 *Wheat.* 356.

126. If the same combination existed before in machines of the same nature, up to a certain point, and the party's invention consists in adding some new machinery, or some improved mode of operation to the old, the patent should be limited to such improvement; for if it includes the whole machine, it includes more than his invention, and therefore cannot be supported. *Id.*

127. When the patent is for an improvement, the nature and extent of the improvement must be stated in the specification, and it is not sufficient that it be

made out and shown at the trial, or established by comparing the machine specified in the patent with former machines in use. *Id.*

128. The former judgment of this Court in the same case, (3 *Wheat.* 454,) commented on, explained, and confirmed. *Id.*

129. It is no objection to the competency of a witness in a patent cause, that he is sued in another action for an infringement of the same patent. *Evans v. Het-tick*, 7 *Wheat.* 453. 3 *Wash. C. C. R.* 408.

130. The 6th section of the patent act of 1793, ch. 156, which requires a notice of the special matter to be given in evidence by the defendant under the general issue, does not include all the matters of defence which the defendant may be legally entitled to make. And where the witness was asked, whether the machine used by the defendant was like the model exhibited in Court of the plaintiff's patented machine, *held*, that no notice was necessary to authorise the inquiry. *Id.*

131. A, having obtained a patent for a new and useful improvement, to wit, a machine for making watch chains, brought an action, under the 3d section of the patent act of 1800, c. 179, [xxv.] for a violation of his patent right, against B; and on the trial, an agreement was proved, made by the defendant with C, to purchase of him all the watch chains, not exceeding five gross a week, which he might be able to manufacture within six months, and an agreement on the part of C to devote his whole time and attention to the manufacture of the watch chains, and not to sell or dispose of any of them, so as to interfere with the exclusive privilege secured to the defendant of purchasing the whole quantity which it might be practicable for C to make: And it was proved, that the machine used by C, with the knowledge and consent of the defendant, in the manufacture, was the same with that invented by the plaintiff, and that all the watch chains thus made by C were delivered to the defendant according to the contract. *Held*, that if the contract was real, and not colourable, and if the defendant had no other connection with C than that which grew out of the contract, it did not amount to a breach by the defendant of the plaintiff's patent right. *Keplinger v. De Young*, 10 *Wheat.* 358.

132. Such a contract, connected with evidence from which the jury might legally infer, either that the machine which was to be employed in the manufacture of the patented article was owned wholly or in part by the defendant, or that it was hired to the defendant for six months, under colour of a sale of the articles to be manufactured with it, and with intent to invade the plaintiff's patent right, would amount to a breach of his right. *Id.*

133. An inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right thus once gone, cannot afterwards be resumed at his pleasure; for, where gifts are once made to the public in this way, they become absolute. *Pennock & Sellers v. Dialogue*, 2 *Peters*, 1.

134. The true construction of the public law is, that the first inventor cannot acquire a good title to a patent, if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent. *Id.*

135. Under the patent act of 21st Feb. 1793, ch. 11, if the patentee has sold out a moiety of his patent right, a joint action lies, by himself and his assignee, for a violation of it. *Whittemore v. Cutter*, 1 *Gallis.* 429.

136. The making of a patented machine fit for use, and with a design to use it for profit, in violation of the patent right, is of itself a breach of the patent right, for which an action lies; but where only a making without user is proved, nominal damages only are to be given to the plaintiff. *Id.* 478.

137. If the oath required by the patent act previous to the issuing of a patent, be not taken, still the patent is valid. *Id.*

138. No defect or concealment in a specification is sufficient to avoid a patent, unless it be with *intent to deceive the public*. *Id.*

139. Counsel fees for prosecuting the suit are no proper item of damage in an action for violation of a patent. *Id.* *Sed vide post*, 168.

140. The original inventor of a machine, who has reduced his invention to practice, is entitled to a priority of patent right, although subsequently the same machine

may have been invented by another person. *Woodcock v. Parker*, 1 *Gallis*. 438. *Bedford v. Hunt*, 1 *Mason*, 302. *Evans v. Weiss*, 2 *Wash. C. C. R.* 342.

141. *Quære*, If the first inventor should abandon his invention? *Id.* 438. *Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

142. If the inventor of an improvement obtain a patent for the whole machine, such patent will be void. *Id.* *Whittemore v. Cutter*, 1 *Gallis*. 478. *Odiorne v. Winkley*, 2 *Gallis*. 51. *Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

143. If an inventor make a gift of his invention to the public, and suffer it to go into general use, he cannot afterwards resume the invention, and hold a patent. *Whittemore v. Cutter*, 1 *Gallis*, 478.

144. In an action for a violation of a patent right, the plaintiff can recover for actual damages only, and not for a vindictive recompense. *Id.*

145. If a user of the patented machine be proved, the measure of damages is the value of the use, during the time of the user. Neither the price, nor the expense of making the machine, is a proper measure of damages. *Id.*

146. In an action on a patent right, the jury are to find single damages, and the Court will treble them. *Id.* *Gray & Osgood v. James*, 1 *Peters' C. C. R.* 394.

147. The sale of the materials of a patented machine, by a sheriff, in an execution against the owner, is not such a sale as subjects the sheriff to an action for an infringement of the patent right. *Sawin v. Guild*, 1 *Gallis*. 485.

148. The original inventor is exclusively entitled to a patent. Mere colourable differences, or slight improvements, will not affect his rights. *Odiorne v. Winkley*, 2 *Gallis*. 51.

149. The identity or diversity of two machines depends, not on the employment of the same elements or powers of mechanics, but upon the producing of the given effect by the same mode of operation, or the same combination of powers. *Id.*

150. The proceedings under the 10th section of the patent act of 21st February, 1793, ch. 11, are in the nature of a *scire facias* at the common law, to repeal a patent. *Stearns v. Barrett*, 1 *Mason*, 153.

151. Upon a trial under the general issue under the 10th section of the patent act, the burthen of proof, that the patent was obtained surreptitiously or upon false suggestion, lies on the plaintiff. *Id.*

152. If a patent has been obtained by the plaintiff, upon the defendant's refusal to submit to an arbitration, according to the provisions of the 9th section of the patent act, and the defendant subsequently obtain a patent for the same invention, this is not conclusive proof that the latter was obtained surreptitiously or upon false suggestions. *Id.*

153. The law entitles a party to a patent for a new and useful invention; and by "useful" is meant, not an invention in all cases superior to the modes now in use for the same purpose, but "useful," in contradistinction to frivolous and mischievous intentions. *Lowell v. Lewis*, 1 *Mason*, 182. *Et vide* 169, *post*.

154. The patentee must describe in his patent, in what his invention consists, with reasonable certainty; otherwise, it is void for ambiguity. *Id.*

155. If it be an improvement in an existing machine, he must, in his patent, distinguish the new from the old, and confine his patent to such parts only as are new; for if both are mixed up together, and a patent is taken for the whole, it is void. *Id.*

156. If an invention is definitely described in the patent, so as to distinguish it from what is before known, the patent is good, although the specification does not describe the invention in such full, exact and clear terms, that a person skilled in the art or science of which it is a branch, could construct or make the thing invented, unless such defective description or concealment were with intent to deceive the public. *Id.* *S. P. Gray & Osgood v. James*, 1 *Peters' C. C. R.* 394.

157. As among inventors, he who is first in time has a prior exclusive right to the patent for the invention. *Id.* *S. P. Bedford v. Hunt*, 1 *Mason*, 302.

158. A joint patent may well be for a joint invention, but not for a sole invention of one of the patentees. *Barrett v. Hall*, 1 *Mason*, 447.

159. If each of the patentees obtain separate patents for the same invention, as his exclusive invention, and afterwards both obtain a joint patent for the same invention, as their joint invention, they are estopped by their joint patent to assert any title under the several patents. *Barrett v. Hall*, 1 *Mason*, 447.

160. A patent may well be for a new combination of machines, whether the machines be old or new. But one patent cannot at the same time include an exclusive right in the combination and in each of the machines; and it is no infringement of a patent for the combination, to use either of the machines separately. *Id. Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

161. There must be several patents for several improvements of distinct machines. *Id.*

162. A patent for an improved machine must show in the specification in what the improvement precisely consists, and the patent be limited to those improvements. If not specified, the patent is void for ambiguity; if broader than the improvement, it is void on other grounds. *Id.*

163. Where a combination of machinery exists up to a certain point, and the patentee makes an improvement, he should not include in his patent the whole machinery, but only the improvement. *Id.*

164. If a party make an improvement on an existing machine, or invent a new machine, his patent should not be for a method, but for his machine, or improved machine. *Id.*

165. An inventor cannot, under the patent act of the United States, have two subsisting valid patents for the same invention. The first patent, while it remains in full force and unrepealed, is an estoppel to any subsequent patent by the same person for the same invention, and the time of his exclusive right begins to run from that period. *Odiorne v. Amesbury Nail Factory*, 2 *Mason*, 28.

166. Where a patent is for several improvements in a machine, and each improvement is summed up in the patent as the invention of the patentee, he is bound by his summary, and if any one of the improvements is proved not to be new, his patent is void. *Moody v. Fisk*, 2 *Mason*, 112.

167. Where several improvements in a machine are distinctly claimed in a patent, an action lies for the piracy of any of the improvements, although the defendant have not used the whole of the improvements. *Id.*

168. A jury may if they see fit in a case for infringing a patent give the plaintiff as part of his "actual damage" such expenses for counsel fees, &c. as have been necessarily incurred in vindicating the plaintiff's right by a suit, and which are not taxable in the bill of costs. *Boston Manufacturing Co. v. Fiske*, 2 *Mason*, 119.

169. By useful invention in the patent act of the United States, is meant, an invention, which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the moral health or good order of society. *Bedford v. Hunt*, 1 *Mason*, 302.

170. It is of no consequence, whether its utility be general or limited to a few cases; and it is not necessary to establish, that the invention is of such general utility, as to supersede all other inventions now in practice to accomplish the same purpose. *Id.*

171. In order to defeat a subsequent patent, it is not necessary to prove, that the invention has been previously in general use, and generally known. It is sufficient, if the same invention has been previously known and put in actual use, however limited the use, or the knowledge of the invention, might have been. *Id.*

172. Drawings annexed to a specification, and referred to by numbers and letters in the specification, constitute a part of the specification, and may be referred to in aid of the description to give it certainty. *Earl v. Sawyer*, 4 *Mason*, 1.

173. A combination, if simple and obvious, yet if entirely new, is patentable; and it is no objection to it, that up to a certain point it makes use of old machinery. *Id. Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

174. A patentee of an invention cannot maintain a suit after he has made an assignment, for any violation of his patent; but the suit must be brought by the assignee. *Herbert v. Adams*, 4 *Mason*, 15.

175. An assignment made before the patent is obtained, is good, and binds the right. *Id.*

176. If an inventor knowingly suffers his invention to go into public and general use without objection, it is a dedication of it to the public, and he cannot afterwards resume the exclusive right. *Mellus v. Silsbee*, 4 *Mason*, 108.

177. Our patent act differs from the English in several respects. A mere public use by others before taking a patent, on a sale thereof by the inventor, is not decisive against him here as it is in England. *Id.*

178. If to an action for a violation of a patent right, the defendant plead the general issue; it is sufficient in the notice of special matter to state, that the plaintiff is not the original inventor, if the defence is founded on such an allegation; and it is not necessary to state in the notice, who was the inventor, or who had previously used the machine. If the notice specifies some persons who used the machine, the use thereof by others may be given in evidence. *Evans v. Kremer*, 1 *Peters' C. C. R.* 215. *Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

179. There is no limitation of the period in which, when the general issue is pleaded to an action on a patent, the defendant may give in evidence that the patentee is not the original inventor. *Evans v. Eaton*, 1 *Peters' C. C. R.* 322.

180. Where two machines are substantially the same, and operate in the same manner to produce the same kind of result, they must be in principle the same. *Gray & Osgood v. James*, 1 *Peters' C. C. R.* 394.

181. If an invention for which a patent has been obtained, is improved by any person other than the patentee, the inventor of the original machine has no right to use the improvements; and the inventor of the improvements has no right to use the original machine, without the license of the patentee. *Id.* *Reutgen v. Kanours*, 1 *Wash. C. C. R.* 168.

182. After a patent is granted for an invention or discovery, the disuse of it by the patentee is not an abandonment of the rights of the patentee to the same, but they continue for fourteen years from the date of the patent. *Gray & Osgood v. James*, 1 *Peters' C. C. R.* 394.

183. *Quare*, If in an action for the violation of a patent right, where the general issue has been pleaded, it is competent to the defendant to give in evidence that the machine is useless, and has been abandoned? *Id.*

184. If a machine in the state in which it was first made, was so far inferior to other machines used for the same purpose as that it was of no intrinsic value, yet if another person superadd to the invention and remove its defects, the inventor of the improvements derives no right to the original machine from having made it of value by addition to it. *Gray & Osgood v. James*, 1 *Peters, C. C. R.* 476.

185. Where the declaration describes the plaintiff's improvement in the words of the patent, it is not necessary that the description of the machine as stated in the specification, should be set forth. If the defendant require the specification in his defence, he may have it placed on the record by asking oyer of it. *Id.*

186. *Quare*, Whether the usefulness of an invention be matter of fact to be left to the jury, or whether the Court are to decide it as matter of law? *Langdon v. De Grool*, 1 *Paine*, 203.

187. But, it seems, that if on the plaintiff's own showing, the invention appears to be useless, and an imposition on the public, the Court should so direct the jury. *Id.*

188. An invention of an ornamental mode of putting up thread, which gave it no additional value, but merely made it sell more readily at retail, and for a larger price, was held not useful within the meaning of the patent law. *Id.*

189. A patent, under the law of 1793, is valid, although the invention may have been in use for years anterior to the patent, if the patentee was the original inventor. *Goodyear v. Mathews*, 1 *Paine*, 300.

190. A patent for an entire machine is valid, although the invention consists only of an improvement on such machine; but the patentee is entitled to an exclusive use of no more than his improvement. *Id.*

191. The first section of the patent law of 1793, construed in connection with the other sections of the act, means that the invention should not be known or used as the invention of any other person than the patentee before the application for a patent. *Morris v. Huntington*, 1 Paine, 348.

192. If the invention have got into use while the inventor was practising upon it with a view to improve it before applying for a patent, such use does not invalidate the patent; and the motive for delay is a question for the jury. *Id.*

193. One who has patented his invention cannot take out a new patent for the same invention, until the first is surrendered, repealed, or declared void. *Id.*

194. The obstacle of an invalid patent may be removed by having it declared void after a verdict against it, or by having a *vacatur* entered *ex parte* in the Department of State on a surrender of the patent. But the provisions of the 6th section of the act, do not enable a patentee to declare his own patent void, and a verdict in a suit on the second patent in favour of such patent, does not avoid the first patent. *Id.*

195. It seems that on surrendering a patent and taking out a new one, the latter should be for only the unexpired part of the fourteen years since obtaining the first patent. *Id.*

196. *Quære*, Whether a new patent can be taken out where a patent has been declared void under the 6th section of the act? *Id.*

197. On an application for an injunction to restrain the infringement of a patent right, it should be stated in the bill, or by affidavit, that the complainant is the inventor: and the bill must be sworn to. It is not sufficient that he swore to this fact when he obtained his patent. *Sullivan v. Redfield*, 1 Paine, 441.

198. To obtain the injunction, the case should be such as to leave little if any doubt in the minds of the Court, as to the validity of the patent; especially if it rests upon the complainant's own showing without any opposing testimony. *Id.*

199. The act of 15th February, 1819, does not alter the principles on which injunctions are granted, but merely extends the jurisdiction of the Circuit Courts to parties not before falling within it. *Id.*

200. The established rules which govern Courts of Equity, on such applications are, that where there has been an exclusive possession of some duration, under the patent, an injunction will be granted without putting the party previously to establish the validity of his patent at law. But where the patent is recent, and it is attempted to be shown that the specification is bad, or otherwise that the patent ought not to have been granted, the Court will not take the decision upon itself, but will send the party to establish his patent at law. *Id.*

201. A patent for an improvement should describe the machine in use, that it may be known in what the improvement consists. *Id.*

202. One had patented, "a new and useful improvement in the steam tow-boat," but the specification did not mention the invention as an improvement, but simply described a tow-boat: Held, that the specification was broader than the patent, and therefore bad. *Id.*

203. The invention should be so clearly described, as to enable the public to put it in use. *Id.*

204. The specification described the invention, as "consisting essentially in attaching the packet to the steam-boat, with ropes, chains, or spars, so as to communicate the power of the engine from the towing vessel to the vessel taken in tow, and kept always at convenient distance, the manner of applying the power, varying with the circumstances in some measure:" held bad for uncertainty, and as describing a well known natural power, and not an invention. *Id.*

205. If the allegations and suggestions in the petition for a patent are substantially recited in the patent, it will be sufficient; but the omission to do this will invalidate it. *Evans v. Chambers*, 2 Wash. C. C. R. 125.

206. The plaintiff, not having assigned the whole of his title and interest in the invention, and no deed of assignment being recorded in the office of the Secretary

of State, may recover, in an action for an infringement, notwithstanding any agreement to assign. *Park v. Little*, 3 Wash. C. C. R. 196.

207. If an invention is an improvement in the principle of a machine for which a patent has been granted, it is not a violation of the patent—if it is an improvement in the form, it is such a violation. *Id.*

208. If the patent and specification do not state in what the improvement consists, in full, clear and exact terms, where the patent has been granted for an improvement; the plaintiff cannot recover for an alleged violation of it. *Evans v. Hettick*, 3 Wash. C. C. R. 408.

209. If two machines be substantially the same, and operate in the same manner, to produce the same result, though they differ in form, proportions, and utility, they are the same in principle; and the one last discovered, can have no other merit, than to be an improvement of the other; but for which the inventor can obtain no patent. If the improvement be in the principle, a patent may be obtained for the improvement. *Evans v. Eaton*, 3 Wash. C. C. R. 443.

210. A witness, who uses a machine resembling that of the plaintiff, is not an incompetent witness for the defendant; because the patent of the plaintiff may be defective, as the Court cannot, in the case in which he is offered as a witness, declare the patent void, so as to benefit the witness; although in this case a verdict should be given for the defendant, on the ground that the plaintiff was not the original inventor of the machine. *Id.*

STATUTES OF THE UNITED STATES VIII.

Priority acts.

211. Under the 2d and 4th sections of the act of the 3d of March, 1797, c. 368, a certified transcript from the books of the Treasury is evidence against the defendant; and no claim for any credit can be admitted at the trial, which has not been presented to, and disallowed by the accounting officer of the Treasury, (unless in the cases excepted by the act,) although no proceedings have been had against the debtor, under the act of the 3d of March, 1795, c. 289, by notification from the Treasury Department, requiring him to render to the Auditor of the Treasury his accounts and vouchers for settlement. *Walton v. United States*, 9 Wheat. 651.

212. *Quære*, Whether the act of the 3d of March, 1795, c. 289, is not virtually repealed by the act of the 3d of March, 1797, c. 368? *Id.*

213. It is obvious that the latter clause of the 65th section of the act of 1799, ch. 128, is merely an explanation of the term "insolvency," used in the first clause; and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. *Conard v. Atlantic Ins. Co.* 1 Peters. 439.

214. Insolvency, in the sense of the statute, relates to such a general divestment of property, as would in fact be equivalent to insolvency in its technical sense. It supposes, that all the debtor's property has passed from him. *Id.* 439.

215. Mere inability of the debtor to pay all his debts, is not an insolvency within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause already referred to. *Id.* 439.

216. The priority, as limited and established in favour of the United States, is not a right which supercedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignees; but it is a mere right of prior payment out of the general funds of the debtor in the hands of the assignees. *Id.* 439.

217. The assignees are rendered personally liable, if they omit to discharge the debt due to the United States. *Id.* 439.

218. It never has been decided by this Court, that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possession or not. *Id.* 441.

219. A general lien by judgment on land, does not constitute, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell, or otherwise dispose of the land. *Id.* 443.

220. Insolvency or inability to pay his debts, by any one who is a debtor to the United States, does not give the United States a preference, unless the same be accompanied with a voluntary assignment of all the property of the debtor for the benefit of his creditors. *Aliter*, if there be a legal insolvency. *Thehusson v. Smith*, 1 *Peters'* C. C. R. 195.

221. Under the 5th section of the act of March, 1797, an assignment, to entitle the United States to their priority, must be an assignment of all the debtor's property; but it need not be for the benefit of all his creditors. *United States v. Mott*, 1 *Paine*, 188.

222. An assignment made by a debtor of the United States, when his property was about being levied upon, under judgments obtained against him by one of his creditors, in trust, first for the debt of such creditor, and then for the debt of the United States, was held to be a voluntary assignment, and fraudulent and void against the United States, notwithstanding the creditor gave up his intention of levying, in consideration of such assignment, and that the property might be sold under it to the best advantage, for the benefit of the U. States. *Id.*

223. And on a bill filed by the United States, to obtain their priority in such a case, against the creditor and sureties, who were joint assignees of the debtor's estate, the Court refused to suspend its decree in favour of the United States, against the assigned property, until they should have proceeded to execution on their judgment against the sureties, or to make any decree in favour of the creditor against the sureties, notwithstanding the assignment had been received by the creditor for their benefit, and at their request, and they, by becoming parties to it, had covenanted for the execution of its trusts. *Id.*

224. *Quere*, Whether such relief would have been afforded the creditor if the sureties had been properly before the Court for that purpose? *Id.*

225. An assignment under the act of Congress, of 1797, to entitle the United States to their priority, must be an assignment of all the debtor's property: that is, the assignment must be a general one as opposed to a partial assignment, or an assignment professedly of a part only of the debtor's property. *United States v. Clarke*, 1 *Paine*, 629.

226. Where there is an omission of an article of property in an assignment which purports to be general, but which does not show that the intention was that the assignment should be partial as opposed to a general one, it does not take the case out of the act. *Id.*

227. If the assignment does not on its face appear to be general, the *onus probandi* is on the United States. *Id.*

228. The priority of the United States does not attach by the mere concealment of their debtor while insolvent. The "legal bankruptcy" mentioned in the act applies only to cases of legal insolvency, where by operation of law the debtor's property is taken out of his hands to be distributed by others. *Id.*

229. An assignee is not liable under the act until notice of the debt due the United States. But the notice need not be given by the United States, nor is a judgment or suit against him necessary in order to charge him with notice. The notice must be such as is required in ordinary cases of trustees, and enough to put a prudent man on inquiry. *Id.*

230. Where the debtor, at the time of making the assignment, informed the assignee that he was surety on a bond to the United States, and that he believed the bond was broken, it was held sufficient notice to the assignee. *Id.*

231. The bond on which he was such surety was a paymaster's bond, conditioned that the latter should well and truly account for and pay over all moneys re-

ceived by him as such paymaster : Held, that the debt of the paymaster to the United States was created by the advances made to him, and not at the time of striking a balance of account against him on the Treasury books ; and that the surety became a debtor as soon as the paymaster failed to account according to law. *Id.*

232. And it was held, that it was not necessary that the debt of the surety should be ascertained by a judgment against him in order to make the assignee chargeable with its payment ; but that the latter might in the action against himself have the benefit of any reduction which the surety was entitled to. *Id.*

233. Where the United States are entitled to a priority, they can bring an action of *assumpsit* against the assignee for moneys received by him under the assignment. *Id.*

234. The article omitted in the assignment was a debt from the assignee to the debtor of the United States, growing out of a previous partnership between them. After the making of the assignment the assignee gave the debtor his bond for the debt : Held, that if the bond was given for moneys of the debtor in the assignee's hands at the making of the assignment, the amount might be recovered in *assumpsit*, but not if it grew out of unsettled partnership concerns. *Id.*

235. Where *assumpsit* is brought against an assignee, and he has funds which cannot be reached by the action, it seems, that he is not entitled to a deduction for his expenses incurred in the preservation of the property, and the execution of his trust. *Id.*

236. Where a part of the assigned property had been sold at auction under the direction of the assignee, it was held enough *prima facie* to show that he had received the price for which it was sold. *Id.*

237. Where the consignee of a cargo had given bond for the duties, which the surety was compelled to pay, and both consignee and owner had become bankrupt, the surety is not entitled to a preference over other creditors of the bankrupt owner, under the 65th section of the collection act of March 2d, 1799, ch. 128. Such owner not being the principal in the bond within the language of the act. *Childs v. Shoemaker*, 1 Wash. C. C. R. 494.

238. A surety on custom-house bonds, who has paid the same after a commission of bankruptcy had issued, is entitled to a preference over the general creditors, and is to be first paid out of the effects of the bankrupt. *Mott v. Maris' assignees*, 2 Wash. C. C. R. 196.

239. P. paid a sum of money to the United States as surety for S. in a bond for duties. S. became insolvent, and assigned his effects to Baker, who received \$4000, under the assignment, mixed the same with his own funds, and afterwards became bankrupt, and the defendants were appointed his assignees, but no effects, known to be part of the estate of S. came into their hands. Held, that although the United States might, under the 65th section of the collection act, be entitled to claim of the defendants, to the amount which came into the hands of B, as the assignee of S, the provisions of the law do not extend to the surety who has paid the bond, the same rights and privileges. *Pollock v. Baker's assignees*, 2 Wash. C. C. R. 490.

240. The preference given to the United States over other creditors, in suits against collectors, does not destroy a prior legal lien. *United States v. Sheriff of Charleston, Bee*, 196.

241. If the persons or property of debtors of the United States, are within the jurisdiction of our Courts, the United States have a priority over all other claimants. *Harrison v. Sterry, Bee*, 244.

STATUTES OF THE UNITED STATES IX.

Revenue and navigation acts. (A) *Impost acts.* (B) *Excise acts.* (C)
Registry of vessels acts. (D) *Slave trade acts.*

(A) *Impost acts.*

242. Under the 91st section of the duty act of 1799, c. 128, the share of a forfeiture, to which the collector, &c. of the district, is entitled, is to be paid to the person who was the collector, &c. in office at the time the seizure was made, and not to his successor in office at the time of condemnation and the receipt of the money. *Buel v. Van Ness*, 8 *Wheat.* 312.

243. The French tonnage duty act of the 15th of May, 1820, c. 126, inflicts no forfeiture of the vessel, for non-payment of the tonnage duty. The duty is collectable in the same manner as by the collection act of 1799, c. 128. *The Apollon*, 9 *Wheat.* 362.

244. The 29th section of the collection act of 1799, c. 128, does not extend to the case of a vessel arriving from a foreign port, and passing through the conterminous waters of a river, which forms the boundary between the United States and the territory of a foreign State for the purpose of proceeding to such a territory. *Id.*

245. In a libel of information under the 67th section of the collection act of 1799, c. 128, against goods, on account of their differing from the contents of the entry, it is not necessary that it should allege an intention, of defrauding the revenue. 200 *Chests of Tea*, 9 *Wheat.* 430.

246. The term "*bohea tea*," is used in the duty act in its known commercial sense; and the *bohea* of commerce is not usually a distinct and simple substance, but is a compound, made up in China, of various kinds of the lowest priced *black teas*. But, by the duty acts, it is liable to the same specific duty, without regard to the difference of quality and price. *Id.*

247. The Secretary of the Treasury has authority, under the remission act of the 3d of March, 1797, c. 361, [lxvii.] to remit a forfeiture or penalty accruing under the revenue laws, at any time, before or after a final sentence of condemnation or judgment for the penalty, until the money is actually paid over to the collector for distribution. *The United States v. Morris*, 10 *Wheat.* 246.

248. Such remission extends to the shares of the forfeiture or penalty to which the officers of the customs are entitled, as well as to the interest of the United States. *Id.*

249. Under the duty act of 1799, c. 128, [cxxxviii.] s. 43, it is no cause of forfeiture, that the casks, which are marked and accompanied with the certificates required by the act, contained distilled spirits which have not been imported into the United States, or a mixture of domestic with foreign spirits; the object of the act being the security of the revenue, without interfering with those mercantile devices which look only to individual profit, without defrauding the government. *Sixty Pipes of Brandy*, 10 *Wheat.* 421.

250. The words "*true value*," in the 11th section of the duty act of the 20th of April, 1818, c. 361, mean the *actual cost* of the goods to the importer at the place from which they were imported, and not the *current market value* of the goods at such place. *The United States v. Tappan*, 11 *Wheat.* 419.

251. If the collector, in fact, suspect that the goods are invoiced below the *current market value* thereof, at the place from which they were imported, but does not suspect that they were invoiced below the *true and actual cost* thereof to the importer, the collector has no right to direct an appraisement. *Id.*

252. But, whenever, in the *opinion* of the collector, there is just ground to suspect that the invoice does not truly state the *actual cost* of the goods, he may direct the appraisement, and is not bound to disclose the grounds upon which he forms

that opinion, whether it is formed from his knowledge or information of the *current market price* of the goods, or other circumstances affording grounds to suspect the invoice to be fraudulent. *Id.*

253. The term "*concealed*," as used in the 68th section of the duty act of the 2d of March, 1799, ch. 128, applies only to articles intended to be secreted and withdrawn from public view on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive. The forfeiture inflicted by that section, does not extend to a case where, the duties not having been paid or secured in any other manner than by giving the general bond, and storing the goods according to the 62d section of the act, the goods were fraudulently removed from the store-house agreed upon by the collector and the importer, by some person other than the claimants, who were *bona fide* purchasers of the goods, and without their knowledge and consent, to another port, where the goods were found stowed on board the vessel in which they were transported, in the usual manner of stowing such goods when shipped for transportation. *United States v. 350 Chests of Tea, 12 Wheat. 486.*

254. Under the 62d section of the act, in the case of *teas*, the duties are "secured to be paid," in the sense of the law, by the single bond of the importer, accompanied by a deposit of the teas imported, to be kept under the lock and key of the inspector, and subject to the control of the collector and naval officer, until the duties are actually paid, or otherwise secured; and no forfeiture is incurred, under the 68th section, by the removal and concealment of goods on which the duties have been thus "secured to be paid." *Id.*

255. To authorize the seizure and bringing to adjudication of teas, under the 43d section of the act, it is necessary, not only that the chests should be unaccompanied by the proper *certificates*, but also by the *marks* required to be placed upon them by the 39th section. *Id.*

256. The lien of the government for duties, attaches upon the articles from the moment of their importation, and is not discharged by the unauthorized and illegal removal of the goods from the custody of the custom-house officers. *Id.*

257. *Quære*, Whether such a lien can be enforced against a *bona fide* purchaser without notice that the duties were not paid or secured? *Id.*

258. A question of fact, under the 46th section of the collection act of the 2d March, 1799, c. 128, exempting from duty the wearing apparel and other personal baggage of persons arriving in the United States. *The Robert Edwards, 6 Wheat. 187.*

259. Under the 67th section of the collection act of the 2d of March, 1799, ch. 128, where goods were entered by an agent of the owner on his behalf, and the entry included only a part of the goods which the packages contained, and the owner subsequently made a further, or post entry of the residue of the goods; and the packages being opened several days afterwards and examined by the collector in the presence of two merchants, and their contents found to agree with the two entries taken together, but to differ materially from the first entry; *held*, that the collector was not precluded from making a seizure of the goods after the second entry, for a variance between the contents of the packages and the first entry, and that such seizure must be followed by confiscation, unless it should appear that such difference proceeded from accident and mistake, and not from an intention to defraud the revenue. *The United States v. Six Packages of Goods, 6 Wheat. 520.*

260. A bond given for the payment of duties, in the alternative required by the act, 1799, ch. 128, is discharged by performance of either part of the condition at the election of the obligor, although the sum named in the condition be less than the duties. *United States v. Thompson, 1 Gallis. 388.*

261. The collector, by the act of 9th January, 1809, ch. 72, was authorized to seize for any violation, and would have had the right, even upon general principles. *The Bolina, 1 Gallis. 75.*

262. To make such a seizure legal, it was not necessary that it should be made by the collector in person, or by his written authority; nor that a record of such seizure should be made. *Id.*

263. It was not necessary that the collector's notice, under this act, should specially state the requisitions of the act. *Id.*

264. The 50th section of the collection act, 1799, ch. 128, applies to all cases of unloading goods without a permit in any port or place within any collection district, whether originally intended for the port of discharge or not. *The Industry*, 1 *Gallis*. 114.

265. *Quare*, if the the 27th section of the same act be not confined to cases of illegal unloading before the vessel has arrived at a port of delivery, or at least to an unloading without such port. *Id.*

266. A vessel is forfeited by the unloading without a permit of goods exceeding \$400 in value, which were not brought in such vessel from a foreign port, but transhipped into her on the homeward voyage. *The Harmony*, 1 *Gallis*. 123.

267. Duties accrue upon the arrival in a port with intent to unlade the cargo there, and not upon the entry of the goods at the custom-house. The importation is complete on such arrival. *United States v. Lindsey*, 1 *Gallis*. 365.

268. Under the 8th sec. of the coasting act, 1793, ch. 8, no forfeiture is incurred, until the vessel has actually broken ground with intention to commence a foreign voyage. *The Julian*, 1 *Gallis*. 43.

269. The forfeiture in such cases does not attach, until the vessel has actually quitted the port, with an intent to proceed on such foreign voyage. *The Friendship*, 1 *Gallis*. 45.

270. "Foreign voyage," in the 8th sec. of the coasting act, means a voyage intended to some place within the jurisdiction of a foreign country, or at least without the territorial waters of the United States. *The Lark*, 1 *Gallis*. 55.

271. If a coasting vessel be engaged in illegal traffic, it is a good cause of forfeiture within the 32d sec. of the act, 1793, ch. 8. *The Two Friends*, 1 *Gallis*. 118. *The Julia*, 1 *Gallis*. 233. *The Murs*, 1 *Gallis*. 237.

272. If a vessel licensed for the fisheries take on board goods with intent to transport them on an illicit voyage, it is sufficient "trade other than that for which she is licensed," within the same section. *Id.* 118. *S. P. The Eliza*, 2 *Gallis*. 4.

273. A licensed vessel, transferred in whole or in part to a foreigner, is forfeited under the same section, notwithstanding upon such transfer the license becomes void. *Id.* 118.

274. Under the same section, the cargo found on board at the time of seizure, is forfeited, and not merely the cargo on board at the time of committing the offence. *Id.*

275. A voyage to a foreign port within the usual voyage of vessels licensed for the fisheries, is not a "foreign voyage" within the meaning of the 8th section of the act, 1793, ch. 8. There must be an intent to trade. *The Three Brothers*, 1 *Gallis*. 142.

276. If a coasting vessel arrive from one district at another district in the same state, having on board foreign goods exceeding eight hundred dollars in value, without being provided with, or exhibiting a manifest of such cargo, it is not an offence for which the vessel is forfeited under the act, 1793, ch. 8. *The America*, 1 *Gallis*. 231.

277. The provisions of the 30th sec. of the collection act of March 2, 1799, ch. 128, apply to vessels arriving at a port, whether the arrival be voluntary or by stress of weather, or the port be the intended port of discharge or not. *United States v. Webber*, 1 *Gallis*. 392.

278. An *inspector* is an officer of the customs, the obstruction of whom is an offence within the 71st section of the act, 1799, ch. 128. *United States v. Sears*, 1 *Gallis*. 215.

279. If an *inspector* be commissioned and sworn, and in the actual execution of the duties of the office, with the knowledge of the treasury department, it is sufficient proof of his being regularly appointed, even supposing that the approbation of the secretary of the treasury were necessary to such specific appointment. *Id.*

280. On a trial for obstructing an inspector, it is not necessary to produce the collector's commission, who appointed him. Proof that the collector acts in such office *de facto*, is sufficient. *Id.*

281. A "foreign port or place," within the meaning of the 1st section of the act of 6th July, 1812, chap. 129, is a port or place within the sovereignty of a foreign nation. *The Eliza*, 2 *Gallis*. 4.

282. If a vessel licensed for the coasting trade engage in smuggling foreign goods, she is forfeited under the 32d sec. of the coasting act. *The Resolution*, 2 *Gallis*. 47.

283. No person can be permitted to set up the defence, that goods unladen within the 27th section of the act of 2d March, 1799, ch. 128, were unladen by unavoidable accident, necessity or distress, unless he has made the requisite proofs thereof stated in that section, before the collector, or has been prevented by inevitable accident, &c. from furnishing such proofs. *United States v. Hayward*, 2 *Gallis*. 486.

284. It is no legal evidence of such proofs having been furnished to the collector, that he has admitted the goods to entry; nor is such entry any legal evidence of the existence of such accident, necessity or distress. *Id.*

285. The belief of the collector is a legal evidence of the existence of such accident, necessity or distress. *Id.*

286. The presumption, which the law makes in favour of the good faith and integrity of the collector, is for his own protection; but it can, in no respect, vary the rights of third persons, or change the general rules of evidence applicable to such rights. *Id.*

287. It is a good defence under the 50th sec. and 92d sec. of the act of 2d March, 1799, ch. 128, that the party has been prevented, by inevitable accident, necessity or distress, from complying with the requisitions thereof. But such defence, is not allowable under a plea, which simply puts in issue a denial of the facts constituting a forfeiture within those sections. *Id.*

288. If the proper port of entry for the District be in possession of the enemy, the collector of the customs has a right to remove the custom-house to some other convenient port within the District, and there to admit vessels to entry. *Id.*

289. If an unlivery of a foreign vessel, at the port of entry for the District become impossible from the port being in possession of the enemy, and such unlivery be indispensable for the preservation of the property, it may be lawfully made at a port of delivery only. *Id.*

290. What constitutes a case of unavoidable accident, necessity or distress. An imminent and immediate danger of capture, &c. constitutes such a case; but not if the danger be remote, or not instant and pressing. *Id.*

291. To authorize an unlading under the 27th sec. of the act of 2d March, 1799, as in a case of accident, necessity or distress, the danger of capture must act directly on the goods or vessel, and the circumstances must be such, as render an immediate unlading indispensable to the safety of the goods, and not merely such as render it hazardous or impracticable to carry the goods to their port of destination. *Id.*

292. Fines imposed for obstructing officers of the customs as well as penalties, under the act of 1799, ch. 128, are to be received and distributed by the collector. *Ex parte Marquand*, 2 *Gallis*. 552.

293. An officer of the customs, duly commissioned, and acting in the duties of his office, is presumed to have taken the regular oaths. *United States v. Bachelder*, 2 *Gallis*. 15.

294. If the collector appoints and commissions an inspector, the approbation of the Secretary of the Treasury is presumed. *Id.*

295. The office of an inspector of the customs ceases with that of the collector who appointed him; and an indictment for resisting such inspector after the resignation of the collector, and before his being re-appointed to office by the succeeding collector, cannot be sustained. *United States v. Wood*, 2 *Gallis*. 361.

296. The Secretary of the Treasury has no power to remit penalties, unless in cases provided for by law. *The Margarettia*, 2 *Gallis*. 519.

297. If the Secretary recites his authority under a special act, and assumes to remit in pursuance of that act, the remission, if unsupported by such act, cannot be supported under the general act, of 3d March, 1797, ch. 67. *Id.*

298. Under the act of 27th Feb. 1813, ch. 175, the Secretary of the Treasury had no authority to remit penalties for goods *subsequently* imported, contrary to the non-importation acts. *Id.*

299. Under the act of 3d March, 1797, ch. 67, the District Judge must state the facts, and not merely the evidence of the facts; and the secretary must proceed upon the statement only. *Id.*

300. In making such statement the judge acts judicially, and is bound by the same rules of evidence as in other cases. *Id.*

301. A statement by the district judge, that the claimant only swore to the facts before him, is not legal proof under the act of 1797, upon which the secretary is authorized to remit. *Id.*

302. Under the act of 27th Feb. 1813, ch. 175, the secretary had no authority to remit a part only of the property forfeited. He was bound to remit the whole penalty or forfeiture, if any. *Id.*

303. Neither under the act of 1797, nor that of 1813, had the secretary any authority to remit the Collector's share of the forfeiture *eo nomine*. *Id.*

304. Until final judgment, no part of the forfeiture vests absolutely in the collector; but after final judgment his share vests absolutely, and cannot be remitted. *Id.*

305. *Quære*, Whether fines for offences, as well as penalties and forfeitures, can be remitted by the Secretary of the Treasury under the act of 1797, ch. 67? *Ex parte Marquand*, 2 *Gallis*. 555.

306. If an officer of the customs seizes goods, a party, who resists the seizure, is not guilty of concealment within the 69th section of the collection act of 2d March, 1799, ch. 128, merely by such act of resistance; although the goods are taken away, and wholly removed from the custody of the officer in consequence thereof. *United States v. Farnsworth*, 1 *Mason*, 1.

307. Debt lies in favour of the United States against the importer for the duties due on goods imported. *United States v. Lyman*, 1 *Mason*, 482.

308. The right to duties accrues by the importation with an intent to unlade; and immediately upon the importation the duties become a personal charge and debt on the importer. *Id.*

309. A bond taken at the custom house to secure the duties due by the importer is not an extinguishment of the debt so accruing, but merely collateral security for its payment. *Id.*

310. No person but the owner or consignee, or in case of his sickness or absence, his agent or factor, is by the revenue laws entitled to enter and bond goods at the custom house. A sub-purchaser after importation has no such right. *Id.*

311. The collector has no authority to receive the bond of any person as security for the payment of duties, except such person be legally entitled to enter them. *Id.*

312. Debt lies against the importer for the duties on smuggled goods. So, where by mistake or accident, or fraud, no bond is given to secure them. So where short duties only have been paid. *Id.*

313. An information of debt, or an information in the nature of a bill of discovery and account, is a proper remedy for the United States in such cases. *Id.*

314. In a libel on the 50th section of the revenue act of the 2d March, 1799, ch. 128, it is not necessary to allege the goods to be of foreign growth or manufacture. *The Betsey*, 1 *Mason*, 355.

315. The 27th section of the revenue act of 2d March, 1799, ch. 128, comprehends foreign as well as American vessels, bound to the United States. *Id.*

316. The 66th section of the revenue act of 1799, ch. 128, by the terms, "*actual cost*," means the true and real price paid for the goods in case of a *bona fide* sale.

and the forfeiture is not inflicted by that section when the goods are invoiced according to such price, or a real *bona fide* sale, although the purchase be below the ordinary market price. But the terms "actual cost" do not apply to the case of a voluntary gift or conveyance, when the substantial consideration is not money or its equivalent estimated at a money price. Nor do they apply to a case where the consideration is partly money, and partly love and affection. *United States v. 10 Packages of Goods*, 2 *Mason*, 48.

317. The 54th section of the revenue collection act of 1799, ch. 128, respecting the breaking of locks and fastenings put on vessels by inspectors, applies to vessels in the coasting trade as well as vessels coming from foreign ports. *United States v. Mantor*, 2 *Mason*, 123.

318. An appraisement regularly made under the act of 18th April, 1818, ch. 74, for the purpose of ascertaining the value of goods subject to an *ad valorem* duty, is conclusive as to the value on which the duty is to be estimated, and no evidence is admissible to prove, that the *actual cost* or *value* is different. *Tappan v. United States*, 2 *Mason*, 393.

319. The act of 18th April, 1818, ch. 74, for the purpose of ascertaining the value of goods subject to an *ad valorem* duty, is strictly constitutional. But it has not changed the basis of the valuation, on which duties are ordinarily to be estimated. The "*actual cost*," is still the true basis; and an appraisement under the 11th section, is never to be ordered by the collector, unless he personally suspects, that the invoice is undervalued, for that section applies only to fraudulent invoices. *Id.*

320. Silver dollars are "goods, wares, and merchandise," within the 50th section of the revenue act of 2d March, 1799, ch. 128, for the landing of which a permit from the custom-house is necessary. *The Elizabeth and Jane*, 2 *Mason*, 407.

321. Where, by mistake, fraud, or accident, the tonnage and light duties, payable by law, are not paid by the owner of a vessel, an action of debt lies against him to recover them. But not against a mere consignee of the vessel, for he has no interest or special property in the vessel. *U. States v. Hathaway*, 3 *Mason*, 324.

322. Neither by the British treaty of 3d July, 1815, nor by any act of Congress, nor by the President's proclamation of 24th August, 1822, are British ships coming from ports in British colonies, entitled to enter American ports, on payment of the same tonnage and light duties as American vessels; but they are to pay the full duties on foreign vessels. The treaty of 1815 applies only to vessels coming from European ports. *Id.*

323. By the revenue act of 20th April, 1818, ch. 74, s. 4, in calculating duties on *ad valorem* goods, the actual cost is to be taken, including all charges except *commissions*, outside packages, and insurance. *U. States v. May*, 3 *Mason*, 98.

324. If the importer actually pays commissions, the charge is excepted. *Id.*

325. Nor is it any objection that an agent of the importer makes him debtor for the goods in the invoice, as *bought of the agent*, if in fact he has acted only as agent for the importer in the purchase. *Id.*

326. Where a collector's term of office expires under the act of 1820, he is entitled to one half of the commissions upon bonds taken by him and then outstanding, and collected by his successor, as being a case within the equity of the act of 1799, ch. 129. *Bates v. Drury*, 4 *Mason*, 118.

327. The words of the 29th section of the revenue act of 1799, ch. 128, "*more interior district*," mean a district more interior within the common sense of the terms, that is, further within the indentations, or inlets, of the contiguous and adjacent country. *U. States v. Bearse*, 4 *Mason*, 192.

328. A vessel, arriving in the district of Barnstable from Nova Scotia, and bound to New-York, must make entry in Barnstable district, for New-York is not, in the sense of the 29th section, "*a more interior district*," with reference to Barnstable. *Id.*

329. Hats made of Palmetto leaf are not hats made of straw, chip, or grass, within the act of 22d May, 1824, ch. 136, and therefore pay only a duty of 15 per cent. *ad valorem*. *U. States v. Goodwin*, 4 *Mason*, 128.

330. A vessel, engaged in the coasting trade, and having goods on board, which have not paid duties, is not within the purview of the 50th section of the revenue act of 1799, ch. 128, as to landing foreign goods without a permit. *Jackson v. U. States* 4 *Mason*, 186.

331. The proviso in the revenue collection act of 1799, ch. 128, s. 62, as to transfer before entry of goods, does not interfere with the general validity of such transfers. Its object is only the security of the duties due to the government, and the duties on the goods being paid, the transfer, if *bona fide*, is complete for all legal purposes. *D'Wolf v. Harris*, 4 *Mason*, 515.

332. The second proviso of the 62d section of the collection act of 1799, ch. 128, makes the consignee of goods liable as owner for the duties thereon; but it does not prevent the consignee from passing, by sale or otherwise, a good title to the same goods, subject only to the payment of the duties thereon. If the consignee owes other bonds for duties, which are due and unpaid, he is entitled to no credit for duties at the custom-house; but the goods themselves may pass by sale, and are liable only for the duties payable thereon, and not for other duties due and unpaid. *Houland v. Harris*, 4 *Mason*, 497.

333. The fourth section of the act of 1820, ch. 122, referring to the act of 1818, ch. 65, and that referring again to the revenue acts of the United States, as to the mode of suing for, and recovering penalties and forfeitures, &c. does not, by implication, adopt the 71st section of the collection act of 1799, ch. 128, as to the *onus probandi* being thrown on the claimant, on seizures under the act. *The Abigail*, 3 *Mason*, 331.

334. The surveyor appointed for the port of *Eastport*, under the act of 7th May, 1822, ch. 107, is surveyor of the District of *Passamaquoddy*, and entitled to act for the whole district, and receive fees accordingly. *Ayer v. Thatcher*, 3 *Mason*, 153.

335. The prohibitions of the act of 2d March, 1799, ch. 128, do not extend to a case, where merchandise has been taken out of a vessel, more than four leagues from the coast. 1 *Peters' C. C. R.* 7. *The Virgin*.

336. A merchant vessel, from which goods are unladen without a permit, after her arrival within the limits of the United States, but before she has reached her port of destination, is not liable to forfeiture under the act of Congress, passed March 2d, 1799. *The Hunter*, 1 *Peters' C. C. R.* 10.

337. Under the 93d section of the duty act of 1799, unless a manifest of the cargo on board of a vessel about to depart from a port in the United States for a foreign port, be sworn to, and delivered or tendered to the collector, by the master, or person having command of the vessel, the collector is not bound to grant a clearance for such vessel. *Bas v. Steel*, 1 *Peters' C. C. R.* 406.

338. A manufacturer, living in an inland town of a foreign country, might, under the collection law of 1799, and before the act of 20th April, 1818, invoice any article manufactured by him, and exported to the United States, at the actual cost of the raw material, and the price or value of the labour employed in manufacture, adding the expense of transportation to the seaport whence it was shipped. This is the cost at the place of exportation within the meaning of the law. 15 *Bales of Paper v. U. States*, 1 *Paine*, 149.

339. It was holden a sufficient and legal excuse for an incorrect entry of goods, that they were entered from an invoice made out in great hurry and agitation, while the goods were packed at Caen, in the absence of the owner, in order to secure them by removal from an apprehended pillage by the Prussian soldiery, who occupied the place. *U. States v. Nine Packages of Linen*, 1 *Paine*, 129.

340. Where goods are seized as forfeited, under the act of 20th April, 1818, for being entered at the custom-house differently from the invoice, the inquiry cannot be made at the trial, whether such difference proceeded from accident or mistake, the question being referred exclusively to the Secretary of the Treasury. *U. States v. One Case Hair Pencils*, 4 *Paine*, 400.

341. Nor has the collector a right to make such inquiry on the seizure of goods under this act. *Id.*

342. The provision in the act of 2d March, 1799, allowing such inquiry to be made by the Court or collector, is impliedly repealed by the act of 20th April, 1818. *Id.*

343. The spirit of the revenue laws is not to create a forfeiture of property, except for acts of the owner attended with fraud, misconduct, or negligence. *U. States v. 651 Chests of Tea*, 1 Paine, 499.

344. He is not to suffer for the fraud, misconduct, or negligence of the revenue officers, in which he does not participate. *Id.*

345. Spirits, wines, and teas are not subject to seizure, under the 43d section of the collection law, which declares, that "if any chest, &c. shall be found in the possession of any person, unaccompanied with the marks and certificates, it shall be presumptive evidence that the same is liable to forfeiture," unless the certificates and marks are both wanting. *Id.*

346. "Possession of any person," as used in this section, means the possession of the purchaser, to whom the certificates are required to be delivered on a sale, and not the possession of a wrong doer. *Id.*

347. The collection law is adapted to a regular and usual course of business, and extraordinary cases where a compliance with its letter is impracticable, do not come within its sense and meaning. *Id.*

348. The information alleged, that the teas were unaccompanied by marks and certificates; but the proof was, that the certificates only were wanting: *Held*, that the averment was unsupported by proof. *Id.*

349. And the necessity of this allegation shows that the true construction of the act is, that both must be wanting. *Id.*

350. The want of marks and certificates, and not the illegal importation or non-payment of duties, is the specific cause of forfeiture under this section. *Id.*

351. And this is evident, from its not being necessary to allege in the information, that the teas were illegally imported, or the duties unpaid, but only that they were unaccompanied with marks and certificates. *Id.*

352. So of the other provisions of the act, their object is to guard against illegal importation and the non-payment of duties; but the forfeiture which they create is incurred only by a violation of the special regulations which the law has provided as guards and checks. *Id.*

353. The marks and certificates being evidence only of a lawful importation, the want of them affords no presumption of the non-payment of duties. *Id.*

354. Impolicy of allowing a forfeiture where it is to be the consequence of the fraud or negligence of such revenue officers as might entitle themselves to a share of it. *Id.*

355. The general bond of the importer for duties on teas, accompanied with a deposit of the teas, as provided for by the 62d section of the collection law, is a securing of the duties, within the meaning and true interpretation of the 43d section. *Id.*

356. And if this were not such a securing of the duties, the teas could not have been landed.

357. A deposite, in all cases under this act, is in effect, a pledge, and in lieu of the personal sureties dispensed with, unless specially declared to be otherwise. *Id.*

358. Whether, if government regain the possession of teas irregularly obtained from their keeping, without the payment of duties, they can enforce their lien for the duties, or how long such lien continues after the teas have got into circulation in the market? *Quære. Id.*

359. A forfeiture for the embezzlement of wines, &c. under the 5th section of the act of April 20, 1818, is incurred only by the act of the owner, and not of a mere stranger, or the inspectors of the revenue. But the provisions of this act have no application to a case arising under the 43d section of the collection law. *Id.*

360. The Secretary of the Treasury has power, under the act for the mitigation and remission of forfeitures, to remit as well the moiety or share allowed to indivi-

duals as the part belonging to the government. *United States v. Morris*, 1 Paine, 209.

361. And a decree of condemnation or judgment has not the effect so to vest or consummate the rights of individuals, as to secure them against the exercise of this power. *Id.*

362. There is no analogy between this power and the power of the King to pardon in England. *Id.*

363. And it is a power wholly distinct from the constitutional pardoning power of the President. *Id.*

364. Its object is to afford merited relief where Courts of Justice are obliged to inflict the penalty. *Id.*

365. The word *prosecution*, as it is used in the act for the remission of penalties, comprehends all the proceedings in a suit as well before as after judgment, including the execution. *Id.*

366. *Quære*, As to the period at which the power of the Secretary to remit ceases? *Id.*

367. But, *it seems*, not before the penalty has been collected and distributed. *Id.*

368. *Quære*, Whether the Secretary has the exclusive right to determine at what period he may legally remit? *Id.*

369. Under the 66th section of the collection act of March, 2d, 1799, ch. 128, goods must be entered at the market value at the place of exportation. *Goodwin v. United States*, 2 Wash. C. C. R. 493.

370. The laws of the United States do not require a person, in order to entitle himself to a clearance, to produce to the collector a certificate of his having complied with the Inspection Laws of the State; unless the law of the State requires it. *Bas v. Steele*, 3 Wash. C. C. R. 381.

371. If a neutral, within the territory of one belligerent, contemplate an illicit intercourse with the enemy, such as to supply him with provisions, the clearance of the vessel might be withheld by the collector. *Id.*

372. The collector must show probable cause for his suspicions; and if the party, having it in his power to remove the suspicions by evidence, fails to do so he is not entitled to damages for the refusal of the clearance by the collector. *Id.*

(B) *Excise acts.*

373. The act of 24th July, 1813, which imposed "a duty on all sugar refined within the United States," after the first day of January, 1814; did not subject to the duty, sugar refined before that day and put into moulds. *United States v. Pennington*, 1 Peters' C. C. R. 113.

374. A *rectifier* of spirits distilled from *domestic materials*, is not a *distiller* of spirituous liquors within the meaning of the act of 24th July, 1813, sec. 98. *U. States v. Tenbrook*, 1 Peters' C. C. R. 180.

375. Whether, under the provisions of the act of 5th June, 1794, sugars, remaining in the place in which they were refined, when the law was repealed, were liable to pay the duties. *Coxe v. Pennington*, 1 Wash. C. C. R. 65.

(C) *Registry of vessels act.*

376. A case of forfeiture, under the 27th section of the registry of vessels act, of December 31, 1792, c. 146, for the fraudulent use of a register, by a vessel not actually entitled to the benefit of it. *The Luminary*, 8 Wheat. 407.

377. Under the 16th sec. of the ship registry act of the 31st of December, 1792, c. 1, a transfer of a registered vessel of the United States, to a foreign subject, in a foreign port, for the purpose of evading the revenue laws of the foreign country, with an understanding that it is to be afterwards reconveyed to the former

owner, works a forfeiture, unless the transfer is made known in manner prescribed by the 7th section of the act. *The Margaret*, 9 *Wheat*. 421.

378. The statute does not require a beneficial or *bona fide* sale ; but a transmutation of ownership, "by way of trust, confidence, or otherwise," is sufficient. *Id.*

379. The proviso in the 16th section of the ship registry act, being by way of exception from the enacting clause, need not be taken notice of in a libel brought to enforce the forfeiture. It is matter of defence to be set up by the party in his claim. *Id.*

380. The proviso only applies to the case of a *part owner*, and not to a *sole owner* of the ship. *Id.*

381. The trial in such a case, is to be by the Court, and not by a jury, in seizures on waters navigable from the sea by vessels of ten tons burthen and upwards. *Id.*

382. The ship registry acts of the United States have not changed the common law as to the mode, in which ships may be transferred ; but only take from any ship not transferred according to those acts, the character of an American ship. *Weston v. Penniman*, 1 *Mason*, 306. *S. P. Philips v. Ledley*, 1 *Wash. C. C. R.* 226.

383. By the general maritime law, a transfer of a ship should be evidenced by a bill of sale. *Id.* 306.

384. The legal title in a registered ship, may, consistently with the acts, exist in one person, and the equitable title in another ; and the disclosure of such equitable title is not required by the acts, unless one party be an alien. *Id.*

385. A citizen of the United States, resident in a foreign country, may, under the act of 31st December, 1792, command a registered vessel of the United States, without her right to the payment of domestic duties being affected thereby ; but under the same act, he cannot be the owner of a vessel of the United States. *U. States v. Gillies*, 1 *Peters' C. C. R.* 150.

386. It is not the *sale* of an American vessel to an American citizen, which subjects the vessel to a forfeiture of her privileges ; but *the neglect to obtain a new register*, when the circumstances of the case, and the provisions of the act of Congress will permit the same to be obtained. *Willing v. United States*, 1 *Wash. C. C. R.* 125.

387. Where a vessel had been registered as an American vessel, when she belonged in part to a foreigner, and she was afterwards sold for a valuable consideration to a person ignorant of the fraud, a libel against her in the hands of such purchaser, was dismissed. *United States v. The Anthony Mangin*, 2 *Peters' Adm. Decis.* 452.

388. By the licensing act of the United States of 18th February, 1793, no coaster can be sold in a foreign port, unless her license be previously surrendered ; nor is her American character changed by such transfer. But if she be condemned for violation of that law, and sold under order of Court, she may become foreign property. So if the purchaser under the first *insufficient title* comply with the requisites of the act of Congress of 4th Aug. 1790. In either case she may be a lawful privateer under a foreign commission. *U. States v. The Hawke, Bee*, 34.

(D) *Slave trade acts.*

389. A libel of information, under the 9th sec. of the slave trade act of March 2d, 1807, c. 77, alleging that the vessel sailed from the *ports of New York and Perth Amboy*, without the captain's having delivered the manifests required by law to the collector or surveyor of *New-York and Perth Amboy*, is defective ; the act requiring the manifest to be delivered to the collector or surveyor of a *single port*. *The Mary Ann*, 8 *Wheat*. 380.

390. Under the same section, the libel must charge the vessel to be of the burthen of 40 tons or more. In general, it is sufficient to charge the offence in the

words directing the forfeiture ; but if the words are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning. *Id.*

391. Under the slave trade act of 1794, c. 187. [xi.] s. 1, it is not necessary, in order to incur the forfeiture, that the vessel should be completely fitted and ready for sea. As soon as the preparations have proceeded so far, as clearly to manifest the intention, the right of seizure attaches. *The Emily and the Caroline, 9 Wheat. 388. The Plattsburgh, 10 Wheat. 133.*

392. The prohibitions in the slave trade acts of the 10th of May, 1800, c. 205. [li.] and of the 20th of April, 1818, extend as well to the carrying of slaves on freight, as to cases where the persons transported are the property of citizens of the United States ; and to the carrying of them from one port to another, of the same foreign empire, as well as from one foreign country to another. *The Merino and others, 9 Wheat. 391.*

393. Under the 4th sec. of the act of the 10th of May, 1800, c. 205. [li.] the owner of the slaves transported contrary to the provisions of that act, cannot claim the same in a Court of the United States, although they may be held in servitude, according to the laws of his own country. But if, at the time of capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who had made a seizure for the same offence, the owner of the slaves may claim ; the section only applying to persons interested in the enterprise or voyage in which the ship was employed at the time of such capture. *Id.*

394. Under the slave trade act of 1794, c. 11, the forfeiture attaches where the original voyage is commenced in the United States : whether the vessel belong to citizens or foreigners, and whether the act is done *suo jure*, or by an agent for the benefit of another person who is not a citizen or resident of the United States. *The Plattsburgh, 10 Wheat. 133.*

395. Circumstances of a pretended transfer to a Spanish subject, and the commencement of a new voyage in a Spanish port, held not to be sufficient to break the continuity of the original adventure, and to avoid the forfeiture. *Id.*

396. Under the 7th section of the slave trade act of 1807, c. 77, the entire proceeds of the vessel are forfeited to the use of the United States, unless the seizure be made by armed vessels of the navy, or by revenue cutters, in which case distribution is to be made in the same manner as prizes taken from the enemy. *The Josefa Segunda, 10 Wheat. 331.*

397. Upon an indictment under the slave trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, testimony of the declarations of the master, being a part of the *res gestæ*, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner, in the conduct of the guilty enterprise, is admissible against the owner. *United States v. Gooding, 12 Wheat. 460.*

398. Upon such an indictment against the owner, charging him with fitting out the ship with intent to employ her in the illegal voyage, evidence is admissible that he commanded, authorized, and superintended the fitting, through the instrumentality of his agents, without being personally present. *Id.*

399. It is not essential to constitute a fitting out under the acts of Congress, that every equipment necessary for a slave voyage, or any equipment peculiarly adapted to such a voyage, should be taken on board ; it is sufficient if the vessel is actually fitted out with intent to be employed in the illegal voyage. *Id.*

400. In such an indictment it is not necessary to specify the particulars of the fitting out ; it is sufficient to allege the offence in the words of the statute. *Id.*

401. Nor is it necessary that there should be any principal offender to whom the defendant might be *aiding and abetting*. These terms in the statute do not refer to the relation of principal and accessory in cases of felony ; both the actor, and he who aids and abets the act, are considered as principals. *Id.*

402. It is necessary that the indictment should aver, that the vessel was built, fitted out, &c. or caused to sail, or be sent away *within the jurisdiction of the United States*. *Id.*

403. An averment that the ship was fitted out, &c. "with intent that the said vessel *should be employed*" in the slave trade, is fatally defective, the words of the statute being, "with intent *to employ*" the vessel in the slave trade, and exclusively referring to the intent of the party causing the act. *Id.*

404. The African slave trade is contrary to the law of nature, but is not prohibited by the positive law of nations. *The Antelope*, 10 *Wheat*. 66.

405. Although the slave trade is now prohibited by the laws of most civilized nations, it may still be lawfully carried on by the subjects of those nations who have not prohibited it by municipal acts or treaties. *Id.*

406. The slave trade is not piracy, unless made so by the treaties or statutes of the nation to whom the party belongs. *Id.*

407. The right of visitation and search does not exist in time of peace. A vessel engaged in the slave trade, even if prohibited by the laws of the country to which it belongs, cannot, for that cause alone, be seized on the high seas, and brought in for adjudication, in time of peace, in the Courts of another country. But if the laws of that other country be violated, or the proceeding be authorized by treaty, the act of capture is not in that case unlawful. *Id.*

408. It seems, that in case of such a seizure, possession of Africans is not a sufficient evidence of property, and that the *onus probandi* is thrown upon the claimant, to show that his possession was lawfully acquired. *Id.*

409. Africans who are first captured by a belligerent privateer, fitted out in violation of our neutrality, or by a pirate, and then recaptured and brought into the ports of the United States, under a reasonable suspicion that a violation of the slave trade acts was intended, are not to be restored without full proof of the proprietary interest; for in such a case the capture is lawful. *Id.*

410. And whether, in such a case, restitution ought to be decreed at all, was a question on which the Court was equally divided. *Id.*

411. The offence of sailing from a port with an intent to engage in the slave trade, is not committed unless the vessel sails *out of* the port, under the act of 20th April, 1818, ch. 86. sections 2 and 3. *U. States v. La Coste*, 2 *Mason*, 129.

412. It is not necessary in an indictment under the 2d and 3d sections of the act of April 20th, 1818, ch. 86, to allege, that the negroes, &c. were to be transported to the United States or their territories, or that they were free, and not bound to service, or that the defendant was a citizen or resident within the United States, or that the offence was committed on board an American vessel. It is sufficient if the indictment follow in these respects, the language of the statute, and is as certain. *Id.*

413. One of the phrases used in the statute, being, "*persons of colour*," it is sufficient in the indictment to use the same words, without more definite specification of the meaning of the words. *Id.*

414. It is sufficient in the indictment, to allege that the defendant "*as master, for some other person, the name whereof being to the jurors yet unknown*," did cause the vessel to sail, &c. *Id.*

415. It is not necessary, under the same sections, to aver, that the defendant *knowingly* committed the offence. *U. States v. Smith*, 2 *Mason*, 143.

416. And it is sufficient if the indictment alleges that the offence was committed after the passing of the act, *at some time* between certain specified days, though no day in certain, on which it was committed, is specified. *Id.*

417. If a foreign claimant of a vessel, seized for being engaged in the slave trade, sets up a title derived from American owners, he must give affirmative evidence, that the case has no admixture of American property. *La Jeune Eugenie*, 2 *Mason*, 409.

418. The African slave trade, abstractedly considered, is inconsistent with the law of nations; and a claim founded upon it, may be repelled in any Court, where it is asserted, unless the trade be legalized by the nation to which the claimant belongs. *Id.*

419. The first section of the slave trade act of 1800, ch. 51, prohibits not merely the transportation of slaves, but the being employed in the business of the slave trade; and therefore a vessel caught in such trade, though before she has taken slaves on board, is liable to forfeiture. *The Alexander*, 3 *Mason*, 175.

420. The act of 22d March, 1794, was intended to prohibit any citizen or resident of the United States from equipping vessels within the United States, to carry on trade or traffic in slaves to any foreign country. *The Tryphenia*, 1 *Wash. C. C. R.* 522.

421. The act of 10th May, 1800, extends the prohibitions to citizens of the United States, in any manner concerned in this kind of traffic, either by personal service on board of American or foreign vessels, wherever equipped; and to the owners of such vessels, citizens of the United States. *Id.*

USURY.

1. It is not usury for a bank to deduct the interest from the amount of a note, at the time of its being discounted. *Flickner v. U. States Bank*, 8 *Wheat.* 338.

2. Although a contract be usurious in its inception, a subsequent agreement to free it from the taint of usury, will render it valid. *DeWolf v. Johnson*, 10 *Wheat.* 367.

3. The purchaser of an equity of redemption cannot set up usury as a defence to a bill brought by the mortgagee for a foreclosure, especially if the mortgagor has himself waived the defence. *Id.*

4. Under a usury law which does not avoid the securities, but only forbids the taking a greater interest than six per centum per annum, a Court of equity will not refuse its aid to recover the principal. *Id.*

5. If a note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury. Yet an endorser of the note, for a usurious consideration, cannot recover upon it; his endorsement being a void act. *Gaither v. Mechanics' Bank of Georgetown*, 1 *Peters*, 43, 44.

6. The branch bank of the United States, at Lexington, Kentucky, discounted a promissory note, reserving interest thereon, at the rate of six per cent. per annum; it being agreed that the owner of the note should receive the proceeds of the discount in notes of the bank of Kentucky, at their nominal value, although the same were at the time of no greater current value than fifty-four per cent. of the said nominal value. *Held*, that the contract was usurious and void; and that the bank could not recover of any of the parties to the discounted note. *Bank of the United States v. Owens*, 2 *Peters*, 527.

7. A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest. According to this principle, the lender in this case has taken forty-six per cent. for three years, or at the rate of about fifteen per cent. per annum above his prescribed interest. This is contrary to the provisions of the charter of the bank of the United States, and against law. *Id.*

8. Reserving interest as discount, is the same as taking the same; since it cannot be permitted by law to stipulate for the receipt or reservation of that which it is not permitted to receive. *Id.*

9. The charter of the bank of the United States forbids the taking of a greater rate of interest than six per centum, but it does not declare a contract on which a greater interest has been taken or reserved, to be void. Such a contract is void upon general principles. Courts of justice are instituted to carry into effect the laws of a country, and they cannot become auxiliary to the violation of those laws. There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal. *Id.*

10. Where there have been running accounts between parties, and one party has been in the habit of transmitting his accounts regularly to the other, striking a balance, and charging or giving credit for interest, as the balance might be, and no objections have been made to it; and where this mode of stating accounts is shown to be the custom of trade, such manner of charging interest is legal, and will be supported. *Barclay v. Kennedy*, 3 *Wash. C. C. R.* 350.

WRIT OF RIGHT.

1. In a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disproving the demandant's seisin. *Green v. Watkins*, 7 *Wheat.* 27.

2. Therefore, where the demandant proves an actual seisin, by a *pedis positio*, the tenant cannot be permitted to prove a superior outstanding title, since it does not disprove the demandant's seisin. *Id.*

3. But where the demandant relies for proof of seisin, solely upon a constructive actual seisin, in virtue of a patent from the State, of vacant lands, the tenant may show that the land had been previously granted by the State, for that divests the title of the State, and disproves the demandant's constructive seisin. *Id.*

4. A writ of right brings into controversy only the titles of the parties to the suit, and is a comparison of those titles; and either party may therefore prove any fact, which defeats the title of the other, or shows it never had a legal existence, or has been parted with. *Id.*

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FINIS.

ERRATA.

Page 8 line 32 from the top, for "state," read "stale."

" 27 "	32	"	"	"	}	for "Jacob Barker v. United States,"
" 30 "	31	"	"	"		read "U. States v. Jacob Barker."
" 36 "	13	"	"	"		
" 39 "	28	"	"	"		Postmaster-General," read "U. States."
" 66 "	27	"	"	"		for Francis et al." read "Francis H. Nicoll."
" 104 "	4					from the bottom, for "1 Wheat. 338," read "7 Wheat. 283."
" 200 "	5					from the top, for "revive," read "reverse."
" 216 "	28	"	"	"		for "learning," read "hearing."

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